Supreme Court, U.S.
FILED

(1) 941054 DEC 14 1994

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

TRANSAERO, INC.,

Petitioner,

v.

LA FUERZA AEREA BOLIVIANA,
an Agency or Instrumentality of the
Republic of Bolivia, a Foreign State,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. What legal criteria are the courts required to utilize when determining whether a department or ministry of a foreign government is an agency or instrumentality for purposes of service of process under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611.

2. Whether a foreign military authority is always presumptively the foreign state and can never be an agency or instrumentality for purposes of service of process under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611.

3. If so, whether strict technical compliance with the service provisions of the FSIA, 28 U.S.C. § 1608(a), rather than substantial compliance, is required where the foreign military authority and diplomatic representatives of the foreign government have been served with copies of the summons and complaint and have actual notice of the pending federal court action and inquest on damages.

4. Whether a federal appellate court reviewing the jurisdictional validity of a default judgment registered in the lower court pursuant to 28 U.S.C. § 1963 is required to give a *res judicata* effect to the prior determination of the federal appellate court with jurisdiction over the court which originally rendered judgment affirming the jurisdictional validity of the judgment.

PARTIES BELOW

The parties in the proceeding below were the following:

Transaero, Inc., a privately-held company which is headquartered in New York State. It has no parent companies, subsidiaries, or affiliates which have any outstanding securities in the hands of the public. Its primary line of business is in the aviation equipment and services industry.

La Fuerza Aerea Boliviana, the Air Force of the Republic of Bolivia.

The United States of America entered an appearance and filed a brief as *amicus curiae* at the request of the District of Columbia Circuit.

GLOSSARY

Throughout this Petition, the term "FSIA" refers to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 -1611.

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I. The criteria used to determine the capacity in which foreign governments are sued in the federal courts for their commercial activities and how service is effected upon them requires a single uniform national standard. 15

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Transaero, Inc., Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994), and is set forth hereto in its entirety in Appendix A. The opinion of the United States District Court for the District of Columbia, reversed and vacated by the D.C. Circuit, has not been reported. It is set forth in its entirety hereto in Appendix D.

The opinion of the D.C. Circuit for which review is being sought invalidated a 1989 default judgment rendered by the United States District Court for the Eastern District of New York which was registered in the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1963. A copy of the 1989 decision is set forth in its entirety in Appendix B. A Memorandum Opinion and Order dated August 12, 1993, of the United States District Court for the Eastern District of New York affirming the validity of the 1989 default judgment has not been reported and is set forth in its entirety in Appendix E. The opinion of the United States Court of Appeals for the Second Circuit affirming the lower court's opinion is reported at *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 24 F.3d 457 (2d Cir. 1994), and is set forth hereto in its entirety in Appendix F. The Supplemental Opinion of the Second Circuit in this case is reported at 1994 U.S. App. Lexis 29369 (2d Cir. Oct. 19, 1994), and is set forth in Appendix G.

GROUNDS FOR JURISDICTION

The D.C. Circuit issued its decision on July 29, 1994. Petitioner timely filed a petition for rehearing and suggestion for rehearing *en banc*. The order denying the petition was issued on September 15, 1994 and is set forth in Appendix H. In accordance with Rule 13.4 of this Court, this petition for a writ of certiorari was timely filed within ninety days of the date rehearing was denied. The jurisdiction of this Court is invoked under *28 U.S.C. § 1254(1)*; *28 U.S.C. § 1602 et seq.*; and *28 U.S.C. §§ 1330* and *1331*.

STATUTES INVOLVED

The statute involved is the Foreign Sovereign Immunities Act, *28 U.S.C. §§ 1330, 1391, 1602 - 1611,* specifically those portions dealing with the definitions of "foreign state" and "agency or instrumentality of a foreign state" set forth at *28 U.S.C. § 1603* and service of process on such entities, set forth at *28 U.S.C. § 1608*. The portions of the statute relevant to this petition are reproduced in Appendix L.

STATEMENT OF THE CASE

This case involves the validity of a 1989 default judgment rendered by the United States District Court for the Eastern District of New York against the Bolivian Air Force. On May 19, 1994, the United States Court of Appeals for the Second Circuit held that the judgment is valid. On July 29, 1994, the United States Court of Appeals for the District of Columbia Circuit held that it is void and unenforceable due to improper service of process. The D.C. Circuit has refused to consider the *res judicata* effect of the prior Second Circuit decision. The Second Circuit has declined to void its prior decision in light of the D.C. Circuit's decision. Petitioner seeks this Court's review of the D.C. Circuit's decision to resolve the current functional split between the circuits and because that decision has erroneously failed to follow the law enacted by Congress and the decisions of this Court.

A. The Original Judgment.

In September of 1988, Transaero filed a verified complaint in the United States District Court for the Eastern District of New York against the Bolivian Air Force. Jurisdiction over the Air Force was invoked on the grounds that it was an agency or instrumentality of the Republic of Bolivia subject to suit under

the provisions of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 - 1611, 1330, 1331. The suit sought recovery of $983,696.60, representing the unpaid balance and accrued interest on invoices owed to Transaero for the sale of aircraft parts sold to the Air Force pursuant to a May, 1981 finance agreement which the parties had entered into because of the Air Force's prior history of slow payments to Transaero.

The case was assigned to the Honorable Jacob A. Mishler, Senior Judge of the United States District Court for the Eastern District of New York. The Air Force was served pursuant to 28 U.S.C. § 1608(b), the provisions of the FSIA governing service of process on agencies or instrumentalities of foreign states. The Air Force failed to file an answer or otherwise enter an appearance within the prescribed time and the clerk of the court noted a default on February 1, 1989.

A hearing with respect to Transaero's Motion for Default Judgment was scheduled for March 30, 1989. On March 10, 1989, counsel for Transaero sent a letter to the Air Force in La Paz, informing it that a default had been entered against it and that an inquest prior to entry of judgment was to be held before Judge Mishler. Copies of the letter were also sent to Judge Mishler, the Consul General of Bolivia in New York, and the Bolivian Ambassador in Washington. Executed returned receipts were received from both the Consul General and the Bolivian Ambassador. On March 17, 1989, counsel for Transaero, in response to a telephone conversation on the same date with the First Secretary of the Bolivian Government, sent by telefax to the Bolivian Ambassador a copy of both the summons and complaint in English and Spanish translations.

The telefax also again advised the Ambassador of the pending March 30, 1989 hearing before Judge Mishler.

Neither the Air Force nor any other representative of the Bolivian Government appeared at the March 30, 1989 hearing. Judge Mishler reserved his decision pending review of Transaero's submitted proof of damages. By Memorandum Decision and Order dated April 21, 1989, Judge Mishler granted Transaero's motion for a default judgment, finding that: (1) The summons and complaint were properly served on the Air Force in accordance with 28 U.S.C. § 1608(b)(3)(B); (2) the Air Force had adequate notice of the hearing scheduled for March 30, 1989, but failed to enter an appearance; (3) The complaint stated a cause of action based on breach of contract for the Air Force's failure to pay amounts due and owing for the purchase and delivery of aviation equipment; (4) The Air Force was not entitled to sovereign immunity under the Foreign Sovereign Immunities Act because its purchases of the aviation equipment constituted "commercial activities" within the "commercial activities" exception of 28 U.S.C. § 1605(a)(2) of the FSIA; and (5) Transaero's claim was supported by the proof submitted and it was thus entitled to judgment. (App. B).

A default judgment was entered against the Air Force in the amount of $983,696.60 on April 28, 1989. (App. C.) No appeal was taken. The judgment was subsequently registered in the United States District Court for the District of Columbia in 1991 pursuant to 28 U.S.C. § 1963. The judgment was also registered in the United States District Court for the Eastern District of Virginia.

B. The D.C. Circuit proceedings.

Transaero subsequently undertook a three year effort to obtain a voluntary payment of the judgment.[1] When these efforts failed, Transaero returned to the federal courts in an effort to judicially enforce it. On June 23, 1992, Transaero, invoking the jurisdiction of the United States District Court for the District of Columbia, served the Air Force pursuant to Rule 69 of the Federal Rules of Civil Procedure with Interrogatories seeking the discovery of its assets.

In response, the Air Force moved to set aside the 1989 judgment as being void for improper service of process. The Air Force argued that it was not an agency or instrumentality of the Republic of Bolivia as defined in Section 1603(b) of the FSIA but instead was only the foreign state as defined within the meaning of Section 1603(a) as used in 28 U.S.C. § 1608(a). It argued that it thus should have thus been served pursuant to the provisions of Section 1608(a) rather than Section 1608(b) of the FSIA.

In opposition to the motion, Transaero asked the court to defer to the prior findings of Judge Mishler or to return the case back to the United States District Court for the Eastern District

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[1] The culmination of these efforts was that, after being provided with copies of the default judgment and underlying documents, the Bolivian Ambassador to the United States sent a November 1, 1991, letter to counsel for Transaero, stating that the Ministry of Foreign Affairs had instructed him to inform Transaero that "the Ministry of Finance is presently able and ready to begin proceedings to reconcile the account of the debt owed to Transaero Inc. by the Bolivian Air Force, through a commission formed by the Ministry of Finance, Transaero Inc., and the Bolivian Air Force. An appropriate payment schedule could subsequently be negotiated with the agreement of all concerned." Transaero returned to the federal courts when the Bolivian government failed to follow through on its promise. (App. J).

for New York for disposition of the motion. Transaero also argued that the Air Force met the FSIA's definition of an agency or instrumentality because it was a separate legal person within the meaning of Section 1603(b)(1) which, under the criteria set forth in the Congressional Committee Report to the FSIA, may be "a department or ministry which acts and is suable in its own name."[2] Alternatively, Transaero argued that the judgment was still valid even if the Air Force was only a foreign state for purposes of service of process, since the Air Force and other representatives of the Bolivian Government had actual notice of the pending lawsuit prior to the inquest hearing and entry of judgment, and substantial compliance with the service provisions is all that is necessary under the FSIA.

In an unpublished Order dated September 25, 1992, the late Judge George H. Revercomb held that he had jurisdiction to hear the motion. Finding that the Air Force had full notice of the matters pending before the Eastern District of New York in 1988 and 1989, Judge Revercomb held that the Air Force is an agency or instrumentality of the Republic of Bolivia for purposes of service of process because the evidence showed that it met the criteria set forth in the Congressional Committee Report that it could contract, hold property, and sue and be sued in its own name. The Air Force had thus been properly served and the 1989 default judgment was valid and enforceable. Because it concluded that the Air Force had been properly served in the New York proceedings, the lower court did not reach the substantial compliance issue. (App. D.)

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[2] H.R.Rep. No. 1487, 94th Cong., 2d Sess. 15-16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614 (hereinafter "House Report"). The relevant portion of the House Report is quoted in full in the majority decision of the D.C. Circuit.

The Air Force appealed Judge Revercomb's decision to the United States Court of Appeals for the District of Columbia Circuit. After hearing oral argument on February 24, 1994, the D.C. Circuit invited the United States to file an amicus brief in the case. The United States had previously declined the request of the Air Force to intervene in this case, but agreed to the court's request. In its amicus brief, the United States took the position that "the armed forces of a sovereign nation are presumptively part of the state itself under the FSIA, but that this presumption can be rebutted by a showing of separateness." To determine separateness, the United States suggested that the courts should examine, "among other factors, the nature of the entity's core function and the substance of the relationship with the state." Because it did not take these points into account, but had instead relied on the factors set forth in the Congressional Committee Report to the FSIA, the United States disagreed with the analytical approach that the lower court had used. The United States took no position on whether the Bolivian Air Force in particular should be treated as an integral part of the central Bolivian state or could be sued as an agency or instrumentality under the FSIA. The United States also took no position on the question of substantial compliance.

C. The concurrent proceedings in the Second Circuit.

Pertinent to this Court's review of this Petition are concurrent proceedings in the Second Circuit affirming the validity of the 1989 judgment which occurred during the pendency of the D.C. Circuit appeal. In May of 1993, while its appeal of Judge Revercomb's order was pending in the D.C. Circuit, the Air Force filed a Rule 60(b) motion in the United States District Court for the Eastern District of New York seeking to set aside the 1989 default judgment as being jurisdictionally void on the

grounds that the court allegedly lacked subject matter jurisdiction over the case in 1989 because it had failed to refer the case to mandatory arbitration under the rules of the Eastern District of New York and that the judgment allegedly had been procured by a "fraud on the court."

Judge Mishler denied the Air Force's motion by an Order dated August 12, 1993. Stating that the challenges raised by the Air Force to the 1989 judgment "strained credulity," Judge Mishler ruled that the Air Force's claims were "nothing more than an alternative interpretation of the documentary evidence from that offered by [prior counsel for Transaero] and ultimately accepted by this Court. The arguments it offers are simply those it could have brought forward at the 1989 hearing, but chose not to do." (App. E at 9, 10.) He thus refused to set aside or reopen the 1989 default judgment.

The Air Force subsequently filed an appeal of Judge Mishler's 1993 ruling to the United States Court of Appeals for the Second Circuit. On appeal, the Air Force again asserted the arguments it had made below, but also more fully argued that the judgment was void because the court had allegedly failed in 1989 to conduct a proper fact finding or comply with the notice requirements for default judgments contained in the FSIA at 28 U.S.C. § 1608(e). In a decision dated May 19, 1994, the Second Circuit affirmed Judge Mishler's 1993 affirmance of the validity of the 1989 default judgment, holding that: (1) the lower court did have proper subject matter jurisdiction over the cause of action in 1989 and that the judgement was not void under Rule 60(b)(4); (2) Judge Mishler had adhered to the requirements of Section 1608(e) of the Foreign Sovereign Immunities Act when entering judgment against the Air Force in 1989; and (3) there was no merit to the Air Force's

allegations that the 1989 judgment had been procured by a "fraud on the court." While recognizing that "[c]ourts go to great lengths ... to permit [default] judgments against foreign sovereigns to be set aside," the Second Circuit refused to set aside the judgment on equitable grounds, although it did remand the case back to the lower court for the limited purpose of re-examining the mathematical accuracy of the award to Transaero. (App. F.)

With regard to the pending appeal in the D.C. Circuit, the Second Circuit noted that "It is BAF's position that it defaulted because it lacked proper notice of Transaero's complaint and of the hearing. Judge Mishler found to the contrary in his Opinion of April 21, 1989 directing entry of the default judgment and so did the late Judge Revercomb in a separate proceeding in the District Court of the District of Columbia. BAF's appeal of Judge Revercomb's Order of September 25, 1992 is now pending in the Circuit Court for the District of Columbia." (App. F, p. 4181 n. 1.)

D. The D.C. Circuit's decision.

By letter dated May 23, 1994, Transaero advised the D.C. Circuit of the Second Circuit's May 19, 1994 ruling and submitted that it was Transaero's position that the Second Circuit's ruling was dispositive of the appeal which was still pending before the D.C. Circuit. (App. K.) Two months later, in a July 29, 1994 split decision, the D.C. Circuit reversed the 1992 decision of Judge Revercomb and held that the 1989 default judgment was void for improper service of process. (App. A.)

Writing for the majority, Circuit Judge Sentelle rejected the criteria set forth in the Committee Report to the FSIA as "being

at odds with itself," and instead adopted a categorical test as to whether the core functions of the foreign entity are predominantly governmental or commercial. In adopting its governmental function test, the majority cited the need for a test which would facilitate ease of administration in the district courts. It then held that "armed forces as a rule are so bound up with the structure of the state that they must in all cases be considered as the "foreign state" itself, rather than a separate "agency or instrumentality" of the state." (App. A at pp 5-9.)

Having held that the Air Force should have been served as the foreign state pursuant to the provisions set forth in Section 1608(a) of the FSIA, the majority next held that notwithstanding the fact that Transaero had properly served the Air Force under Section 1608(b), and that the Bolivian Ambassador, the Bolivian Consul General, the Bolivian First Minister, and the Air Force all had actual notice of the pending suit and notice of inquest, strict compliance with the technical requirements of Section 1608(a), not actual notice, was required to comply with the service provisions of the FSIA. (App. A at pp. 9-11.) The court thus declared the 1989 judgment void and remanded the case to the lower court with the instructions that Judge Revercomb's decision be vacated and the proceedings below dismissed.

Former Chief Judge Mikva dissented from the majority's decision, stating his "fear that in formulating their interpretation my colleagues have placed efficiency concerns - and perhaps their international policy preferences - above the apparent meaning of the statue. Because this case requires us to interpret Congress's enactment, and not to devise common law rules, I think the majority's approach is insufficiently deferential to the legislature." (App. A., dissent p. 1.) Former Chief Judge

Mikva further stated that "the language, policy, and legislative history of the FSIA" did not support the majority's approach. Instead, the lower court had used the proper test in applying the criteria set forth in the Committee Report. (App. A, dissent, p. 4.)

In rendering its decision, the D.C. Circuit did acknowledge that the Second Circuit's earlier decision had noted that both district courts had held that the Air Force had been properly served. However, it refused to consider the *res judicata* effect of the prior May 19, 1994 decision of the Second Circuit affirming the validity of the 1989 judgment on the grounds that Transaero had allegedly not raised this issue in the proceedings before Judge Revercomb. (App. A., p. 4 n. 1.) In its Petition for Rehearing and suggestion for rehearing *en banc* to the D.C. Circuit, Transaero noted to the D.C. Circuit that while it had argued to Judge Revercomb that he should have referred the case back to Judge Mishler, it could not have argued the preclusive effects of the subsequent 1993 and 1994 Second Circuit proceedings in the 1992 proceeding before Judge Revercomb. Transaero further argued that it had raised this issue in briefing the appeal before the D.C. Circuit, and that it could raise it in a petition for rehearing. The D.C. Circuit denied Transaero's Petition for Rehearing and thus did not address these arguments.[3]

In his dissent, former Chief Judge Mikva agreed with the majority that Judge Mishler's 1989 ruling that service was

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[3] Former Chief Judge Mikva did not participate in the D.C. Circuit's disposition of Transaero's petition for rehearing or suggestion for rehearing *en banc*, having made arrangements to leave the bench to assume the position of Counsel to the President.

proper did not preclude the D.C. Circuit from finding to the contrary, but he noted that such a finding, in light of the subsequent acknowledgment by the Second Circuit of Judge Mishler's finding on appeal, would clash with the prevailing Second Circuit law on the facts of the case and would create "the functional equivalent of a split between [the D.C.] Circuit and the Second." (App. A, dissent pp. 1-2.)

E. The current status of the case.

Prior to the issuance of the D.C. Circuit's decision, the Air Force filed a Petition for Rehearing in the Second Circuit proceeding. Upon being informed of the D.C. Circuit's July 29, 1994 decision, the Second Circuit requested supplemental briefing from counsel as to the effect of that decision on its prior May 19, 1994 decision. In a supplemental opinion dated October 19, 1994, the Second Circuit refused to reverse its May 19, 1994 decision in light of the D.C. Circuit's decision, holding that the Air Force's petition for rehearing had not shown that the Court had overlooked or misapprehended any points of law in its original review. The Court did broaden its remand to the lower court to examine the calculation of interest in the 1989 judgment. However, having been informed by Transaero of its intention to file a petition for certiorari to this Court of the D.C. Circuit's decision, the Second Circuit on its own motion stayed the remand pending disposition of Transaero's Petition for Certiorari.[4] (App. G.)

The D.C. Circuit has refused to stay its remand of this case pending Transaero's filing and the disposition of this Petition for

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[4] On November 1, 1994, Transaero filed a petition for rehearing with the Second Circuit limited to asking that Court to reconsider its expansion of the remand to the Eastern District of New York.

Certiorari, even though it was asked to reconsider this ruling in light of the Second Circuit's action of October 19, 1994. (App. I.) The remand of the proceedings in the Second Circuit are currently stayed pending this Court's disposition of this Petition.

REASONS FOR GRANTING THE WRIT

This petition presents important national and international questions concerning the correct interpretation and consistent application of the Foreign Sovereign Immunities Act, the statute which this Court has held provides the sole basis for obtaining jurisdiction over a foreign sovereign in the United States.[5] It also raises important questions of *res judicata* and comity between federal circuits concerning the validity and enforcement of judgments which are registered under 28 U.S.C. § 1963. The D.C. Circuit's majority decision is wrong and contrary to the actual language, policy, and legislative history to the FSIA and the principles of due process embodied in the Constitution. It violates this Court's decision in *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983), and is contrary to prior decisions of the courts of the Second Circuit which have held, based on its own stipulations, that the Bolivian Air Force is an agency or instrumentality of the Republic of Bolivia. The decision introduces uncertainty into the proper interpretation of the FSIA and is in conflict with decisions of the other circuits. It will promote forum shopping by foreign governments and will encourage them to take default judgments. Finally, because the D.C. Circuit failed to adhere to this Court's decisions on the law of *res judicata*, its decision has created a "functional circuit split" between itself and the Second

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[5] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989).

Circuit whose resolution requires this Court to exercise its power of supervision.

I. The criteria used to determine the capacity in which foreign governments are sued in the federal courts for their commercial activities and how service is effected upon them requires a single uniform national standard.

In order to confidently contract with foreign governments, U.S. citizens require a uniform and objective method by which they can invoke the jurisdiction of the federal courts to bring suit and enforce judgments against foreign governments for their commercial activities. This Court has recognized that prior to enactment of the Foreign Sovereign Immunities Act, sovereign immunity determinations were made under "standards [that] were neither clear nor uniformly applied."[6] The FSIA sets forth those circumstances in which a foreign state's sovereign immunity has been waived, thus allowing it to be subject to suit in the U.S. courts. It provides objective legal standards which the courts can use to ensure that claims against foreign governments are uniformly decided. In conjunction with 28 U.S.C. § 1963, the FSIA permits a U.S. citizen to litigate its commercial disputes with foreign governments in the federal courts and, if successful, then register and enforce any judgments against them in any other federal court in the country.

The majority decision of the D.C. Circuit fundamentally undermines this statutory scheme by misconstruing the structure and purpose of the FSIA. This Court has recognized that one

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[6] *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).

of the most significant changes resulting from the FSIA was with regard to military authorities, which used to enjoy automatic sovereign immunity because of the purpose of such entities.[7] In enacting the FSIA, Congress specifically overruled prior law which afforded a presumption of foreign state status and immunity predicated upon the political purpose of the governmental entity's activities, by forbidding the courts from examining the purpose of the entity in determining the form and nature of its sovereign status and the immunity accorded to it.[8] The D.C. Circuit's decision has now afforded foreign military authorities a special status based on their purpose which other courts have said Congress has removed.

The question presented by this case is not the one which implicitly underlies the D.C. Circuit's decision, that is, whether a foreign military authority is entitled to sovereign immunity because it is part of the foreign state. That is a given.[9] Instead, the question is in what capacity a department or ministry of a foreign government must be sued when it engages in

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[7] *See, Republic of Argentina v. Weltover*, 504 U.S. ___, 112 S.Ct. 2160, 119 L.Ed.2d 394, 405 (1992). Also see, *McDonnell Douglas Corporation v. Islamic Republic of Iran*, 758 F.2d 341, 348-349 (8th Cir. 1985), *cert. denied*, 474 U.S. 948 (1986).

[8] 28 U.S.C. § 1603(d); *Republic of Argentina v. Weltover*, 504 U.S. ___, 119 L.Ed 2d 394, 405-407 (1992); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 309, 310 n.27 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1981); *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 349 (8th Cir. 1985); *United Euram Corp. v. Union of Soviet Socialist Republics*, 461 F.Supp. 609, 611-612 (S.D.N.Y. 1978).

[9] By definition, agencies and instrumentalities are also foreign states as the term is generally used in the FSIA. 28 U.S.C. § 1603(a).

commercial activities within the scope of the FSIA, thus waiving its sovereign immunity: as the foreign state itself, as defined under 28 U.S.C. § 1603(a), or as an agency or instrumentality of the foreign state, as defined under 28 U.S.C. § 1603(b).

A uniform answer to this question from this Court reaffirming the objective standards established by Congress for use in answering this question is important because it goes to the heart of whether the FSIA is an effective and predictable vehicle for protecting the interests of both U.S. citizens and the foreign governments with whom they contract.[10] As in this case, when a U.S. corporation contracts with a foreign government, it may deal only with a specific department or division of the government. The contract may be entered into and executed by the named governmental entity, rather than in the name of the state itself. When a dispute arises, both the plaintiff and the court must then determine whether the foreign state itself must be sued as the named defendant, or whether suit should be brought only against the agency, department, or governmental entity with whom the contract was actually entered. This is clearly a fact-specific determination, which Congress has stated hinges on whether the governmental entity is a "separate legal person." 28 U.S.C. § 1603(b)(1).

Unfortunately, the D.C. Circuit has created a problem where none existed. The Congressional Committee Report which the majority in this case has now rejected sets forth objective legal guidelines which other courts - including an earlier panel of the

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[10] House Report, *supra*, note 2, at 32; *Verlinden B.V. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983).

D.C. Circuit - have accepted as being authoritative.[11] In now adopting a different standard, the D.C. Circuit has introduced substantial uncertainty into the law and has departed from this Court's holding that "Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States."[12] The D.C. Circuit's decision is wrong and, as former Chief Judge Mikva states in his dissent, contrary to the actual language, policy, and legislative history of the FSIA. [13]

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[11] *Dayton v. Czechoslovak Socialist Republic*, 834 F.2d 203, 205-206 (D.C.Cir. 1987), cert. denied, 486 U.S. 1054 (1988). *See, e.g., O'Connell Machinery Company, Inc. v. M.V. "Americana"*, 734 F.2d 115 (2d Cir. 1984), cert. denied, 469 U.S. 1086 (1985); *S & S Machinery Co. v. Masinexportimport*, 706 F.2d 411 (2d Cir. 1983), cert. denied, 464 U.S. 850 (1984). Gordon, *Foreign State Immunity In Commercial Transactions* § 6.10 (1991). Even the cases which the majority relies upon to support its holding cite the criteria in the Congressional Committee Report rejected by the D.C. Circuit: they merely disagree as to their application as to the particular facts of their discrete cases. *See, e.g., Segni v. Commercial Office of Spain*, 650 F.Supp. 1040 (N.D. Ill. 1988); *Marlowe v. Argentine Naval Commission*, 604 F.Supp. 703 (D.D.C. 1985); *Unidyne Corp. v. Aerolineas Argentinas*, 590 F.Supp. 398 (E.D.Va. 1984).

[12] *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).

[13] There are very real and tangible consequences to the resolution of this issue for both litigants and the courts in addition to the service of process question. While the provisions of Title 28 setting forth the FSIA generally do not distinguish between a foreign state and its agencies or instrumentalities, they do draw distinctions for purposes of venue, Section 1391, service of process, Section 1608, the entry of default judgments, Section 1608 (e), and the enforcement of judgments through the attachment and execution of property, Section 1610. Each of these provisions go to the very core of how the federal courts can exercise their authority over foreign governments.

II. The decision adopts a subjective and unworkable test contrary to the law enacted by Congress. It conflicts with this Court's *Bancec* decision and the decisions of the lower courts. If allowed to stand, it will encourage foreign governments to engage in forum shopping.

The dangers of the new "common law rule" adopted by the D.C. Circuit were recognized by this Court in *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), with which the D.C. Circuit's decision is in direct conflict. While not an FSIA case, in *Bancec* this Court specifically rejected any mechanical formulas for determining the separate juridical status of government agencies or instrumentalities.[14] The D.C. Circuit's holding that the armed forces of a foreign state are essentially *per se* the foreign state for all purposes is exactly the type of mechanical formula which this Court eschewed in *Bancec*.

In *Bancec*, this Court also specifically declined to adopt the governmental function test adopted by the D.C. Circuit. It did so notwithstanding the fact that in *Bancec*, as in this case, the lower court had adopted, and the Solicitor General had urged, just such a test. The ease of administration in the lower courts cited by the D.C. Circuit as grounds for adopting its standard rather than that of Congress was specifically rejected by this Court as being "too shifting a basis for determining constitutional power and too entangled in expediency to serve

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[14] *Bancec*, 462 U.S. 611 at 633-634.

as a dependable legal criterion."[15]

This Court recognized in *Bancec* that the problem with the test adopted by the D.C. Circuit is that the concept of a "usual" or a "proper" governmental function changes over time and varies from nation to nation.[16] This is exactly the problem which the FSIA was designed to eliminate. Prior to its enactment, the courts frequently asked the State Department to provide advice as to the legal status and sovereign immunity of a foreign entity, just as the D.C. Circuit did in this case. Because Congress recognized that such determinations often turn on political and personal notions of sovereignty, rather than objective legal criterion, it sought to stop this practice and eliminate this problem by adopting the separate legal person standard and providing guidelines that an agency or instrumentality may be an entity "which acts and is suable in its own name."[17] However, because the examples provided by the Committee Report for the FSIA include governmental departments and ministries, as well as specific examples such as mining enterprises and central banks, the D.C. Circuit ruled that the criteria Congress established in the Committee Report for the FSIA is "at odds with itself" and must be rejected. (App. A, p. 7-8.) It did so notwithstanding the fact that the FSIA itself speaks in terms of defense *agencies*.[18]

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[15] *Bancec*, 462 U.S. 611, at 633 n.27, *quoting New York v. United States*, 326 U.S. 572, 580, 90 L.Ed 326, 66 S.Ct. 310 (1946).

[16] *Id.*

[17] *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-490 (1983); House Report, *supra*, note 2, at 7.

[18] 28 U.S.C. § 1611(b)(2).

The D.C. Circuit's decision has achieved exactly the type of inconsistent result which this Court warned of in *Bancec*. In holding that because the armed forces always have a sovereign, as opposed to a commercial, purpose, the Bolivian Air Force should have been sued as the foreign state, the D.C. Circuit ignored prior holdings of the Second Circuit finding that the Bolivian Air Force has previously engaged in the normally private commercial activity of issuing promissory notes.[19] Similarly, according to the Library of Congress, the Bolivian Air Force operates two commercial air line services.[20] Neither the issuance of promissory notes nor the operation of commercial air line services would appear to fall within the definition of "obvious sovereign functions" of the armed forces. Furthermore, the D.C. Circuit has created a conflict with prior rulings of the Second Circuit which have allowed the Bolivian Air Force to be sued as an independently named defendant and those of its lower courts which have held, based on the Air Force's own prior stipulations, that it is an agency or instrumentality of the Republic of Bolivia.[21]

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[19] *Shapiro v. The Republic of Bolivia, the Bolivian Air Force and the Central Bank of Bolivia*, 930 F.2d 1013 (2d Cir. 1991).

[20] Federal Research Division, Library of Congress, *Bolivia: A Country Study*, (3rd. Ed. 1991) pp 236-237.

[21] *Shapiro v. The Republic of Bolivia, the Bolivian Air Force and the Central Bank of Bolivia*, 930 F.2d 1013 (2d Cir. 1991). *Office of the Comptroller General of the Republic of Bolivia on behalf of the Bolivian Air Force and Central Bank of Bolivia v. International Promotions and Ventures, Ltd.*, 618 F. Supp. 202, 203 n.1 (1985). The stipulation is contained at paragraphs one (1) and thirty-three (33) of the Joint Pretrial Order of that case, a copy of which is attached as Addendum B to the Reply Brief of Plaintiff-Appellee Transaero, Inc., to Amicus of United States.

Unless this Court reaffirms its prior ruling in *Bancec*, the D.C. Circuit's decision will lead to similar inconsistent results in other cases. The Third Circuit has allowed the Iranian Air Force to be served as an agency or instrumentality and the Eighth Circuit has exercised jurisdiction over it as a separate and independently named defendant.[22] The courts of the Second Circuit and the Fifth Circuit have found that branches of the Ecuadorian Navy are agencies or instrumentalities under the FSIA.[23] Under the *per se* rule adopted by the D.C. Circuit, any default judgments against these or similar entities rendered by these circuits would now be presumptively invalid and unenforceable in the District of Columbia for improper service of process. Given the importance of the D.C. Circuit as the federal appellate court for the nation's capital and the one jurisdiction where a plaintiff is virtually guaranteed the presence of the foreign government defendant, its decision could lead to forum shopping by foreign governments, resulting in a disproportionate impact on cases in other circuits and a circumvention of the policies underlying the registration of judgments embodied in 28 U.S.C. § 1963.[24]

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[22] *McDonnell Douglas Corporation v. Islamic Republic of Iran, the Ministry of Defense of the Islamic Republic of Iran, and the Islamic Republic of Iran Air Force*, 758 F.2d 341 (8th Cir. 1985); *Behring International, Inc. v. Imperial Iranian Air Force*, 475 F.Supp. 383, 389 (D.N.J. 1979), aff'd in part, 699 F.2d 657 (3d Cir. 1983). *Also see, Behring International, Inc., v. Imperial Iranian Air Force*, 475 F.Supp. 396 (D.N.J. 1979).

[23] *See, e.g., Bowers v. Transportes Navieros Ecuadorianos*, 719 F.Supp. 166, 170 (S.D.N.Y. 1989); *Rodriguez v. Transnave, Inc.*, 8 F.3d 284, 286 n.1 (5th Cir. 1993).

[24] The courts have generally held that when there is a challenge to the validity of a judgment which is registered under 28 U.S.C. § 1963, the court of registration should refer the case back to the court of original jurisdiction for

Furthermore, although the D.C. Circuit claims that its decision will lead to ease of administration by the lower courts, exactly the opposite is true. It will make it much more difficult to effect service of process on and obtain jurisdiction over foreign governments because the "agency or instrumentality" provisions of the FSIA will have essentially have been read out of the Act. After all, what governmental entity cannot claim that by definition its core function is governmental, as opposed to commercial? If the sovereign functions of a governmental entity are not "obvious," judges may, as the D.C. Circuit did in this case, be inclined to again ask the advice of the State Department as to the legal status of the governmental entity. The alternative, as former Chief Judge Mikva suggests in his dissent, is that individual judges may impose upon litigants their own personal "international policy preferences" as to what constitute the "obvious functions" of a governmental entity.

The first result is contrary to the intent of Congress, which sought to take commercial disputes involving foreign

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determination of the issue. However, some courts have adopted an exception for challenges to default judgments which are allegedly void for defective service of process. *See, generally, Indian Head National Bank of Nashua v. Brunelle*, 689 F.2d 245 (1st Cir. 1982). A conflict in the governing law between circuits can thus result in inconsistencies and encourage forum shopping. For example, in this case, Second Circuit doctrine of *judicial estoppel* bars the Bolivian Air Force from denying its agency or instrumentality status because its prior stipulations that it has such a status has been adopted by the courts in other litigation. *See, e.g., Bates v. Long Island Railroad Company*, 997 F.2d 1028 (2d Cir. 1993). However, the D.C. Circuit does not follow the doctrine of *judicial estoppel*, and apparently did not even feel obligated to acknowledge the existence of the other Second Circuit decisions concerning the Bolivian Air Force's legal status. The net result is a conflict between the circuits as to the validity of the same 1989 judgment, thus undermining the purpose of 28 U.S.C. § 1963.

governments out of the realm of politics by transferring "the determination of sovereign immunity from the executive branch to the judicial branch...," clarify the governing standards, and thus "assur[e] litigants that ... decisions are made on purely legal grounds and under procedures that insure due process."[25] And, as this Court has already recognized in *Bancec*, the second result is contrary to the Constitution.

This Court need look no further than the D.C. Circuit's disposition of this case to ascertain that the solution it has adopted to the questions presented by this petition results in a denial of due process.[26] Review is thus required by this Court to reaffirm its holding in *Bancec* and to ensure that the lower courts properly perform the role designated to them by the Constitution and Congress.

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[25] House Report, *supra* note 2, at 7. *Also see, Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).

[26] Not only has every court - including the D.C. Circuit - acknowledged that both the Air Force and the Bolivian Government had actual knowledge of the matters pending in New York prior to the entry of judgment, but, in holding that as a branch of the armed forces the Bolivian Air Force can never have the status of being an agency or instrumentality, the D.C. Circuit forfeited its role as an adjudicatory tribunal in this case by failing to even acknowledge that it had been asked by the petitioner to take mandatory judicial notice under Federal Rule of Evidence 201 that the Bolivian Air Force itself has stipulated to other federal courts that it is an agency or instrumentality.

III. This Court should resolve the circuit conflict on the substantial compliance issue.

Foreign governments, like the government of Bolivia, often try to assert their sovereign immunity by taking default judgments. They then try to set the judgments aside when judgment creditors later attempt to enforce them.[27] The result is that what are by definition simple commercial disputes involving foreign governments do not have a trial and resolution on the merits. Instead, courts and judgment creditors become embroiled in years of litigation wherein foreign governments engage in back-door attempts to have the judgments set aside and the substance of their defenses heard. This is obviously a waste of limited judicial resources and unfair to U.S. citizens, who often spend significant time and money litigating procedural matters only to see what they thought was a valid judgment vacated by a technicality.

One method by which the courts have addressed this problem is to hold that substantial compliance with the service provisions of the FSIA resulting in actual notice of the pending litigation to the foreign government is all that is required under the Act.[28]

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[27] A. John Sutham, Note, *Brokering A Difficult Marriage: Substantive Defenses Under Rule 60(b)(4) Relief From Default Judgements in Foreign Sovereign Immunity Act Proceedings*, 14 Fordham Int'l L.J. 216 (1991). *See, e.g., Meadows v. Dominican Republic*, 817 F.2d 517 (9th Cir. 1987), cert denied, 484 U.S. 976 (1987). The D.C. Circuit itself has warned Bolivia that it may pursue this litigation strategy if it is willing to assume the risks that it may lose the chance to argue the merits of its suit later. *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1546 (1987).

[28] *See, Sherer v. Construcciones Aeronauticas*, S.A., 987 F.2d 1246, 1250 (6th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 72, 126 L.Ed.2d 41 (1993); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 821-22 (3d Cir. 1981), *cert.*

The D.C. Circuit has refused to follow the substantive trend of the other circuits on this issue, claiming that the trend has been limited to cases involving agencies or instrumentalities served under Section 1608(b). However, since the D.C. Circuit decided its case, the Ninth Circuit has formally adopted a substantial compliance standard for FSIA cases, specifically modifying its prior decision in *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340, 345 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 95, 126 L.Ed.2d 62 (1994), which was one of the two cases which the D.C. Circuit relied upon in support of its position that strict compliance is required for service on the foreign state under Section 1608(a). *See, Straub v. A.P. Green, Inc.*, No. 92-16204, ___ F.3d ___, 1994 U.S. App. Lexis 28742 (9th Cir. 1994).

Strict compliance with the service provisions of Section 1608(a) makes it much more difficult for U.S. citizens to serve and sue foreign governments. The legislative history to the FSIA says that service on a foreign state under Section 1608(a) only requires "that the foreign state has actual notice of the suit."[29] The D.C. Circuit's decision will encourage foreign governments to take default judgments and allow them to circumvent the intent and purpose of the FSIA. The D.C. Circuit itself has recognized that this case demonstrates the dangers in allowing differences between the circuits and uncertainty in this area of the law, stating that "[s]ervice of process should be the prologue to the suit rather than the

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dismissed, 455 U.S. 929, 102 S.Ct. 1297, 71 L.Ed.2d 474 (1982); *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344, 1352 (11th Cir. 1982).

[29] House Report, *supra*, note 2, at 23-24.

central drama....The case before us presents the dangers of Section 1608 in somber tones." This case is an appropriate vehicle for this Court to examine the policies underlying the substantial compliance issue and to resolve this question of law.[30]

IV. The D.C. Circuit's decision fails to adhere to this Court's rulings concerning *res judicata*.

Review is needed in order for this Court to exercise its power of supervision over the lower courts. The "functional circuit split" which exists in this case is solely the result of the fact that the D.C. Circuit failed to adhere to prior case law of this Court which clearly provides that the earlier decision of the Second Circuit was *res judicata* on the matters pending in the D.C. Circuit.

This Court has held that when two courts are addressing issues which have an identity of parties and issues, the first and final judgment becomes *res judicata* on the second court's proceedings, even if the issue involved is personal jurisdiction.[31]

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[30] The D.C. Circuit claims that it is the policy underlying the FSIA, rather than just the actual language of the statute, which requires strict compliance when a foreign state is served. The only technical failure in this case was the failure to formally serve the Bolivian Ministry of Foreign Affairs and Worship in La Paz. The D.C. Circuit itself acknowledges that both the Bolivian Air Force and other representatives of the Bolivian Government had full and actual notice of the 1989 proceedings. Thus, both the actual department of government which engaged in the commercial activity sued upon, plus the U.S.-based diplomatic personnel of the government which ostensibly answer to the Ministry of Foreign Affairs, had full and actual knowledge of the lawsuit prior to the entry of the judgment. (App. A, p. 10.)

[31] *Chicago, Rock Island & Pacific Railway Company v. Schendel*, 270 U.S. 611 (1925).

When, during the pendency of its appeal before the D.C. Circuit, the Air Force returned to the courts of the Second Circuit to bring its concurrent challenge to the validity of the 1989 default judgment, it of necessity also had to raise its personal jurisdiction challenges to the validity of that judgment in those courts or have them explicitly or implicitly waived.[32] In disposing of the Air Force's challenges to the 1989 judgment on the grounds that there had been a "fraud on the court", no subject matter jurisdiction, and an improper fact-finding under § 1608(e), both Judge Mishler and the Second Circuit, implicitly and explicitly, found that the lower court had properly exercised personal jurisdiction over the Air Force in 1989. Judge Mishler did so by explicitly holding that the arguments of the Air Force were those "which it could have brought in 1989 but chose not to." The Second Circuit did so by affirming Judge Mishler's ruling and also noting his 1989 finding of proper jurisdiction. Under the law established by this Court, the appeal before the D.C. Circuit was thus barred on *res judicata* grounds once the Second Circuit had issued its decision.

The D.C. Circuit's failure to address the *res judicata* effect of the Second Circuit's decision has created the "functional circuit split" in this case. It violates the prior holdings of this Court. This fact alone requires a summary reversal of the D.C. Circuit's decision.

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[32] *Insurance Corp. of Ireland, Ltd., v. Compagnie Des Bauxites De Guinea*, 456 U.S. 694 (1982); *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522 (1931); *Davis v. Davis*, 305 U.S. 32 (1938); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1939); *American Surety Company v. Baldwin*, 287 U.S. 156 (1931). *See, Gleason v. Jandrucko*, 860 F.2d 556, 560 (2d Cir. 1988) ("fraud on the court" requires moving party to show that there was no opportunity to have the grounds it relied upon to set aside the judgment fully litigated in the original action).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 24, 1994 Decided July 29, 1994

No. 92-7222

TRANSAERO, INC.,
APPELLEE

v.

LA FUERZA AEREA BOLIVIANA,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(91ms00139)

James W. Shannon, Jr., argued the cause for appellant. With him on the briefs was *Gregory B. Craig.*

Ronald N. Cobert argued the cause for appellee. With him on the brief was *Andrew M. Danas. Joseph M. Roberts* entered an appearance.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

On the brief for *amicus* were *Frank W. Hunger*, Assistant Attorney General, *Eric H. Holder, Jr.*, United States Attorney, *Douglas Letter*, Attorney, United States Department of Justice, and *Linda Jacobson*, United States Department of State.

Before MIKVA, *Chief Judge*, and WILLIAMS and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Dissenting opinion filed by *Chief Judge* MIKVA.

SENTELLE, *Circuit Judge:* Transaero, Inc., a New York corporation, obtained a default judgment against La Fuerza Aerea Boliviana ("the Bolivian Air Force") in the Eastern District of New York and registered the judgment in the district court for the District of Columbia. The Bolivian Air Force moved for summary judgment, claiming that the district court in New York lacked personal jurisdiction because the default judgment had been obtained without the service of process required by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611 (1988) ("the Act"). The Bolivian Air Force contended that because it is a "foreign state or political subdivision of a foreign state" within the meaning of section 1608 of the Act, Transaero had served it improperly. The district court held instead that the Bolivian Air Force is an "agency or instrumentality" of Bolivia under the service provisions of section 1608, so that Transaero's method of service gave the New York court jurisdiction. The Bolivian Air Force has taken an interlocutory appeal from the order. *See Foremost–McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990) (denial of a claim of sovereign immunity is an immediately appealable collateral order).

We hold that the Bolivian Air Force is a "foreign state or political subdivision" within the meaning of section 1608 and that Transaero's method of service was defective. We therefore reverse and remand with directions to dismiss.

I.

Transaero sold aviation parts to the Bolivian Air Force throughout the early 1980s. In 1988, Transaero filed a complaint in the Eastern District of New York that alleged breach of contract and sought $983,696.60 in damages. On September 15, 1988, the Clerk of Court dispatched translations of the summons and complaint to the Bolivian Air Force in La Paz, Bolivia by registered mail with a return receipt requested. The Bolivian Air Force received the summons and complaint and sent a return receipt to the Clerk on September 23, 1988. The Bolivian Air Force made no appearance, and Judge Mishler scheduled a hearing on Transaero's motion for default judgment for March 30, 1989. Transaero sent notice of the hearing to the Bolivian Air Force, to the Bolivian First Minister in La Paz, Bolivia, and to the Bolivian Ambassador and Consul General in Washington. When the Bolivian Air Force failed to appear at the hearing, Judge Mishler granted the motion for default judgment. The court found that service had been properly effected under section 1608(b), but made no findings on the adequacy of service under 1608(a). The court also held that it had subject matter jurisdiction over the contract claim under section 1605(a)(2) of the Act, which creates an exception to the general rule of sovereign immunity for claims arising from "commercial activities" conducted by foreign states.

In 1991, Transaero registered the default judgment in the district court for the District of Columbia under 28 U.S.C. § 1963 (Supp. IV 1992) and served a set of interrogatories under Federal Rule of Civil Procedure 69. The Bolivian Air Force entered an appearance and moved to quash the interrogatories and dismiss the proceedings, arguing that the District Court for the Eastern District of New York lacked jurisdiction because the Bolivian Air Force had not been served in compliance with section 1608(a) of the Act. In an order dated September 25, 1992, the District Court for the District of Columbia denied the motion. The court found that Transaero had originally served the Bolivian Air Force under section 1608(b); that the Bolivian Air Force received actual notice of Transaero's lawsuit; and that the Bolivian Air Force

was notified by mail of the hearing on Transaero's motion for default judgment. The court then ruled that, as a matter of law, the Bolivian Air Force is an "agency or instrumentality" of Bolivia and that service under section 1608(b) was proper.

After the Bolivian Air Force's motion for summary judgment was denied, Transaero requested an order compelling the Bolivian Air Force to answer its interrogatories. The judge in charge of the case passed away and that motion apparently has never been resolved. On May 12, 1993, the Bolivian Air Force requested the Eastern District of New York to set aside the default judgment on the ground that it had been procured through fraudulent representations of fact. The court denied the motion, the Bolivian Air Force appealed the denial to the Second Circuit, and the Second Circuit affirmed. *See Transaero, Inc. v. La Fuerza Aerea Boliviana*, No. 93–7903, 1994 WL 197941 (2d Cir. May 19, 1994).[1]

II.

A.

Under the Act, "subject matter jurisdiction plus service of process equals personal jurisdiction." *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). The Bolivian Air Force admits that the New York court had subject matter jurisdiction under the "commercial activities" provision of section 1605(a)(2). It claims only that Transae-

[1] The Second Circuit noted that the district courts in New York and the District of Columbia had held that the Air Force was properly served, but also noted the pending appeal that we decide today. *See id.* at n.1. We do not consider whether the Eastern District's ruling might bar the Air Force's attack on personal jurisdiction, for Transaero did not assert any form of preclusion in the District Court for the District of Columbia, and we have generally refused to raise the question *sua sponte*. *See Nixon v. United States*, 978 F.2d 1269, 1274 n.16 (D.C. Cir. 1992); *Taxation with Representation v. Regan*, 676 F.2d 715, 717 n.1 (D.C. Cir. 1982), *rev'd on other grounds*, 461 U.S. 540 (1983).

ro's service failed to comply with sections 1603 and 1608 of the Act. Section 1603 provides:

> (a) A "foreign state", *except as used in section 1608 of this title,* includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States . . ., nor created under the laws of any third country.

28 U.S.C. § 1603 (emphasis added). Section 1608 does not further define either term. Section 1608(a) establishes certain requirements for service on "a foreign state or political subdivision of a foreign state," while section 1608(b) establishes different requirements for service on "agencies or instrumentalities" of foreign states.

B.

The nub of the dispute is whether the Bolivian Air Force counts as a "foreign state" or rather as an "agency or instrumentality" under section 1608. That in turn depends upon whether the Bolivian Air Force is a "separate legal person, corporate or otherwise" under section 1603(b)(1).[2] The words in themselves are opaque. Some district courts have sought to illuminate them by balancing three "characteristics" of separate legal status: whether, under the law of the foreign state where it was created, the entity can sue and be sued in its own name, contract in its own name, or hold

[2] Both parties agree that the Air Force falls within the other components of the definition in §§ 1603(b)(2) and (b)(3).

property in its own name. *Bowers v. Transportes Navieros Ecuadorianos*, 719 F. Supp. 166, 170 (S.D.N.Y. 1989); *see also Unidyne Corp. v. Aerolineas Argentinas*, 590 F. Supp. 398, 400 (E.D. Va. 1984). But other courts have thought the distinction is instead a categorical one, and depends on whether the defendant is the type of entity "that is an integral part of a foreign state's political structure, [or rather] an entity whose structure and function is predominantly commercial." *Segni v. Commercial Office of Spain*, 650 F. Supp. 1040, 1041–42 (N.D. Ill. 1988). The *amicus curiae* brief of the United States in this case proposes a similar test that looks to the "core function" of the foreign governmental body at issue. *See* Br. of United States at 12–13, 16.

We think that the categorical approach adopted in *Segni* and urged, in a somewhat different form, by the United States—whether the core functions of the foreign entity are predominantly governmental or commercial—best captures the statutory meaning. Congress spoke against a rich background of federal and international law that colors the statutory terms and fills them out. The Supreme Court has held that the Act largely codifies the "restrictive" theory of sovereign immunity, under which "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). *See also Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160, 2165 (1992). Thus the Act repealed foreign immunity for "commercial activities," § 1605(a)(2), but preserved it for inherently sovereign or public acts. *See Saudi Arabia v. Nelson*, 113 S. Ct. 1471, 1479 (1993); *Weltover*, 112 S. Ct. at 2166. The distinction between foreign states and their instrumentalities establishes two categories of actors that correspond to the restrictive theory's two categories of acts.

Besides section 1608, the distinction appears in the venue provisions of 28 U.S.C. § 1391 (1988). Section 1391(f) makes the federal district court for the District of Columbia the venue for civil actions against foreign states and their subdivisions; but it allows venue in suits against an agency or

instrumentality of a foreign state "in any judicial district in which the agency or instrumentality is licensed to do business or is doing business," § 1391(f)(3), a provision of doubtful coherence if extended beyond the category of commercial enterprises. Moreover the phrase "agency or instrumentality," or some close variant, is commonplace in the enabling charters of government corporations, both in the United States and abroad. The statute that created the Panama Railroad Company labelled it an "agency and instrumentality of the United States." *See Panama Railroad Company Act*, ch. 706, 62 Stat. 1076 (1948), at § 245. *See also United States ex rel. Skinner & Eddy Corp. v. McCarl*, 275 U.S. 1, 5, 6, 8 (1927) (referring to the United States Shipping Board Emergency Fleet Corporation as "an instrumentality of the Government," an "incorporated agenc[y]," and a "[g]overnment-owned private corporation[ ]").

The courts that have construed "agency or instrumentality" to reference the defendant's powers under foreign law have relied principally on the House Report on the Act, which said:

> [The] criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.... As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R. REP. No. 1487, 94th Cong., 2d Sess. 15–16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614.

Without debating the legitimacy of reliance upon legislative history in other circumstances, we note that this Report is at odds with itself. All the specific examples recited fall into the

category of public commercial enterprises; but the Report also states a general test that might bar those very examples and might also sweep well beyond them. The United States points out that any nation may well find it convenient (as does ours) to give powers of contract and litigation to entities that on any reasonable view must count as part of the state itself. *See* Br. of United States, at 7–8 (noting that under the House Report test the Departments of State and of Defense would count as "instrumentalities" of the United States). We adopt today an analysis designed to winnow the applications Congress desired from the ones it meant to exclude.

A final reason to favor the categorical approach is ease of administration in the district courts. Service of process should be the prologue to the suit rather than the central drama. When the adequacy of service is made to turn on a complex inquiry carried out long after the litigation has begun, and in which the court must apply foreign law to foreign facts, the service provisions may derail cases rather than ensuring their prompt and orderly commencement. The case before us paints the dangers of section 1608 in somber tones. Today we must face the possibility that an attempt at service made six years ago was defective—a result we seek to forestall in future cases by tying service to the obvious functions, rather than the uncertain powers, of the foreign defendant. The district courts have perforce acquired expertise in delineating the categories of "governmental" and "commercial" under the immunity provisions of the Act, and if section 1608 is construed to turn on a similar distinction that expertise will benefit all concerned.

C.

The question, then, is whether the core functions of the armed forces of a foreign sovereign are governmental or commercial. We hold that armed forces are as a rule so closely bound up with the structure of the state that they must in all cases be considered as the "foreign state" itself, rather than a separate "agency or instrumentality" of the state. The "powers to declare and wage war" are among the

"necessary concomitants" of sovereignty. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). Since the passage of the Foreign Sovereign Immunities Act, the two federal cases to squarely consider the question have held that a foreign military force is a "foreign state" rather than an "agency or instrumentality of a foreign state." *See Marlowe v. Argentine Naval Comm'n*, 604 F. Supp. 703, 707 (D.D.C. 1985); *Unidyne*, 590 F. Supp. at 400.[3] Apart from authority it is hard to see what would count as the "foreign state" if its armed forces do not. Any government of reasonable complexity must act through men organized into offices and departments. If a separate name and some power to conduct its own affairs suffices to make a foreign department an "agency" rather than a part of the state itself, the structure of section 1608 will list too far to one side. We hold that the armed forces of a foreign sovereign are the "foreign state" and must be served under section 1608(a).

III.

As relevant here, section 1608(a) requires that service on foreign states be made

> (3) ... by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or
>
> (4) ... by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be ad-

[3] In *Behring International, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 383, 389 (D.N.J. 1979), *aff'd in part*, 699 F.2d 657 (3d Cir. 1983), the court allowed service on the Iranian Air Force under § 1608(b), but gave no reasons as the defendant did not contest the service. *See Unidyne*, 590 F. Supp. at 400 n.1.

> dressed and dispatched by the clerk of the court to the Secretary of State in Washington....

28 U.S.C. §§ 1608(a)(3)-(a)(4).

Both district courts to hear the case found that Transaero effected service under section 1608(b). The record reveals that Transaero never attempted the methods of service prescribed in sections 1608(a)(3) and (a)(4), electing instead to serve the Bolivian Ambassador and Consul General in Washington, and the Bolivian First Minister and the Bolivian Air Force in La Paz—but never the Ministry of Foreign Affairs or the Secretary of State.[4] Before this court, Transaero does not claim that it strictly complied with section 1608(a), but rather asks that we pronounce the attempted service sufficient because the Bolivian government received actual notice of the suit.

The authorities generally hold that section 1608(b) may be satisfied by technically faulty service that gives adequate notice to the foreign state. *See Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246, 1250 (6th Cir.), *cert. denied*, 114 S. Ct. 72 (1993); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 821–22 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982); *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344, 1352 (11th Cir. 1982). In cases under section 1608(a), however, the decisions have rarely excused defective service. *See Gerritsen v. Consulado General de Mexico*, 989 F.2d 340, 345 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 95 (1994) (service inadequate for failure to include translation of complaint); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (holding that service on Ambassador did not satisfy § 1608(a) requirement of service on "head of the ministry of foreign affairs"). *But see Marlowe*, 604 F. Supp. at 708 (using "substantial compliance" test under 1608(a)).

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[4] Transaero's brief states that the Ministry of Foreign Affairs was "provided with copies of the default judgment and underlying documents" in the fall of 1991. *See* Appellee's Br. at 6. The record, even the pages to which Transaero refers, shows no such thing.

Leniency in this case would disorder the statutory scheme. The Committee Report states that section 1608(a) "sets forth the exclusive procedures for service on a foreign state," but contains no such admonition for section 1608(b). *See* H.R. REP. No. 1487 at 24, *reprinted in* 1976 U.S.C.C.A.N. at 6623. Section 1608(b)(3) allows simple delivery "if reasonably calculated to give actual notice," showing that Congress was there concerned with substance rather than form; but the analogous subsection of section 1608(a) says nothing about actual notice. The distinction is neatly tailored to the differences between "foreign states" and "agencies or instrumentalities." The latter, typically international commercial enterprises, often possess a sophisticated knowledge of the United States legal system that other organs of foreign governments may lack. *Cf. Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1546 (D.C. Cir. 1987) (in suit against foreign state, the rule that objections to personal jurisdiction are waived by an appearance should be sparingly applied because of foreign unfamiliarity with legal process). Thus section 1608(a) mandates service of the Ministry of Foreign Affairs, the department most likely to understand American procedure. We hold that strict adherence to the terms of 1608(a) is required. As Transaero failed to do so, the Bolivian Air Force was not properly served.

IV.

The Eastern District of New York lacked personal jurisdiction, and the default judgment registered in the District of Columbia was therefore void and unenforceable. We reverse and remand with directions to dismiss the proceedings.

It is so ordered.

MIKVA, *Chief Judge*, dissenting: The majority's standard for differentiating between those entities that are "foreign states" and those that are "agencies or instrumentalities" of foreign states under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602–11, is attractive on administrability grounds. But I fear that in formulating their interpretation my colleagues have placed efficiency concerns—and perhaps their international policy preferences—above the apparent meaning of the statute. Because this case requires us to interpret Congress's enactment, and not to devise common-law rules, I think the majority's approach is insufficiently deferential to the legislature. I therefore—reluctantly—dissent.

Before discussing the FSIA itself, it bears mentioning that another court—the United States District Court for the Southern District of New York (Mishler, J.)—has already decided the issue at hand. On April 28, 1989, Judge Mishler rendered a default judgment in this case against the Bolivian Air Force, La Fuerza Aerea Boliviana ("La Fuerza"). That judgment subsequently survived an appeal grounded upon plaintiff's alleged fraudulent misrepresentations to the court. *Transaero, Inc. v. La Fuerza Aerea Boliviana*, No. 93–7903, 1994 Westlaw 197941 (2d Cir. May 19, 1994). As a necessary element of the original default judgment, Judge Mishler found that La Fuerza, "an instrumentality of the Republic of Bolivia," received proper service of process under FSIA § 1608(b), which applies only to "an agency or instrumentality of a foreign state." 28 U.S.C. § 1608(b). Although it did not decide the issue, the Second Circuit acknowledged Judge Mishler's finding on appeal. 1994 Westlaw 197941 at n.1.

Although I agree with my colleagues that Judge Mishler's ruling that service was proper does not preclude us from finding to the contrary, *see* maj. op. at 4 n.1, such a finding would clash with the prevailing Second Circuit law on the facts of this case. Admittedly, the absence of analysis in Judge Mishler's and the Second Circuit's opinions limits their precedential effect on this issue. Nonetheless, a reversal here creates a disagreement in the result. We tell the parties that the statute compels one result; federal courts in another

jurisdiction tell the same parties that the same statute compels the opposite result. Between us, we have thoroughly muddled the law. This is the functional equivalent of a circuit split between our Circuit and the Second; such tension should be avoided if possible.

This tension would cause me far less concern were I convinced by the majority's interpretation of the FSIA. I am not. Despite the majority's able argument, the FSIA and its legislative history suggest no conclusive presumption that a military entity is "a foreign state" and not "an agency or instrumentality" thereof. Instead, the statute lists three factors that define "agency or instrumentality." 28 U.S.C. § 1603(b). The only disputed factor in this case is that the entity must be "a separate legal person." *Id.* § 1603(b)(1). The House Report amplifies the meaning of this phrase: an agency or instrumentality may be "a department or ministry which acts and is suable in its own name." H.R. Rep. No. 94–1487, 94th Cong., 2d Sess. 15–16 (1976); *see* maj. op. at 7, for a lengthier quote. This suggests to me that any presumption—let alone the conclusive presumption the majority adopts—is disfavored. Instead, every foreign entity starts out on the same footing, and a court must decide whether the particular entity is a separate legal person—that is, whether it "acts and is suable in its own name." I suspect the majority is right that most foreign military entities are not legally separate from their sovereign states, but I think it is contrary to the statute to cast this suspicion in terms of a rule.

Nothing in the language of the statute or in the remainder of its legislative history casts doubt upon the House Report's definition of "separate legal person." But the majority sweeps aside this definition with its speculation that an agency or instrumentality must be a commercial, as opposed to a public, enterprise. Maj. op. at 6. This distinction is nowhere to be found in the statute or legislative history. Indeed, the distinction seems inapt, because the FSIA explicitly creates an exception to the general sovereign immunity of foreign states *and* their agencies and instrumentalities for "commercial activity," 28 U.S.C. § 1605(a)(2), but the statute

in no way indicates that a similar test determines "agency" status. The FSIA waives immunity depending on the nature of the activity on which the lawsuit is based, not the nature of the government entity against which the suit is brought. In contrast, for secondary matters (service of process, venue, attachment of property, and punitive damages) the FSIA does distinguish based on the identity of the defendant—it distinguishes between a foreign state and its agencies and instrumentalities. *See* 28 U.S.C. §§ 1391, 1606, 1608, 1610. These are separate distinctions, with different consequences. Yet the majority assumes that the "two categories of actors ... correspond to the ... two categories of acts." Maj. op. at 6. Absent some concrete evidence of statutory intent, I think this is a dangerous assumption.

As its statutory evidence, the majority points to one of the venue provisions of 28 U.S.C. § 1391(f), permitting suits against an agency or instrumentality "in any judicial district in which the agency or instrumentality is licensed to do business or is doing business," 28 U.S.C. § 1391(f)(3), but permitting suits against a foreign state in the United States District Court for the District of Columbia. 28 U.S.C. § 1391(f)(4). What the majority neglects to mention is that § 1391(f)(3) is not exclusive. If the agency or instrumentality is not "doing business," it may be sued "in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(f)(1). The venue provision simply recognizes that many agencies and instrumentalities are commercial enterprises that may conveniently defend suits where they do business. It in no way establishes that an "agency or instrumentality" must always be a commercial enterprise.

The same response applies to the majority's assertion that the House Report "is at odds with itself," maj. op. at 7, because its examples of agencies and instrumentalities tend to be commercial enterprises, while at the same time it seems to adopt a broader general definition of "agency or instrumentality." Again, that many, even most, agencies and instrumentalities may be primarily commercial in nature does not

prove that all must be. If Congress meant for commerciality to be a defining characteristic, it could have said so. Instead, Congress said "separate legal person." 28 U.S.C. § 1603(b)(1). In sum, I see no good reason to focus on a distinction between commercial and non-commercial activities as the touchstone of juridical separateness.

Then what *does* it mean to be legally separate? The House Report gives us a sketchy definition: an entity that "acts and is suable in its own name." In keeping with several district court precedents, the court below looked at contracts executed by La Fuerza, apparently in its own name, and at previous lawsuits in which La Fuerza was mentioned by name (admittedly, an ambiguous indicator), to find that La Fuerza is a separate legal person. *Cf. Bowers v. Transportes Navieros Ecuadorianos*, 719 F. Supp. 166, 170 (S.D.N.Y. 1989); *Unidyne Corp. v. Aerolineas Argentinas*, 590 F. Supp. 398, 400 (E.D. Va. 1984). Although I would prefer more extensive factfinding with regard to La Fuerza's activities—e.g., property ownership, previous contracting history—I think the district court was on the right track.

I think the language, policy, and legislative history of the FSIA suggest that commercial activity is not the ultimate touchstone for FSIA analysis. It makes more sense to engage in a wider factual inquiry into the actions of the entity to determine whether it is a separate legal person. Because I think the district court was basically correct, and because I would prefer to avoid incongruity with the law of this case in the Second Circuit, I respectfully dissent from the majority opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---x

TRANSAERO, INC.,

Plaintiff

CV 88-2788

-against-

Memorandum of Decision and Order

LA FUERZA AEREA BOLIVIANA,
an Instrumentality of
THE REPUBLIC OF BOLIVIA,
a Foreign State,

Defendants.

April 21, 1989

---x

APPEARANCES:

RICH, LILLIENSTEIN, KRINSLY,
DORMAN & HOCHAUSER, P.C.
Attorneys for Plaintiff
99 Park Avenue
New York, New York 10016
Randall S.D. Jacobs, Esq., Of Counsel

LA FUERZA AEREA BOLIVIANA
734 Avenue Montes
La Paz, Bolivia

MISHLER, District Judge

Plaintiff, Transaero Inc. ("Transaero") moves pursuant to Fed. R. Civ. P. 55(b)(1) and 28 U.S.C. § 1608(e) for the entry of a default judgment against defendant La Fuerza Aerea Boliviana ("Fuerza"), an instrumentality of the Republic of Bolivia. The summons and complaint were properly served in accordance with 28 U.S.C.

§ 2608(b)(3) (B) on or about September, 1988, and default was noted by the Clerk of the Court on February 1, 1989. A hearing with respect to plaintiff's motion was scheduled for March 30, 1989 at which time defendant, despite adequate notice, failed to appear.

The complaint states a cause of action based on breach of contract for the failure to pay amounts due and owing for the purchase and delivery of aviation equipment. Such purchases fall within the "commercial activities" exceptions to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) ("FSIA"). See Letelier v. Republic of Chile, 748 F.2d 790, 797 (2d Cir. 1984) (commercial activity "is of the type an individual would customarily carry on for profit"); Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1379 (5th Cir. 1980) (activity is commercial if "the particular conduct giving rise to the claim in question actually constitutes or is in connection with commercial activity, regardless of the defendant's generally commercial or governmental character"). The purchase of aviation equipment constitutes such commercial activity, therefore, the FSIA does not bar entry of default judgment.

Plaintiff seeks the amount of $983,696.60, representing the unpaid balance of the account plus contractual interest to the date of the complaint. Plaintiff's motion is unopposed, and the claim is supported by the proof submitted.

SO ORDERED.

The Clerk of the Court is directed to enter judgment for the plaintiff and against the defendant in the amount of $983,696.60.

/S/

U. S. D. J.

§ 2608(b)(3) (B) on or about September, 1988, and default was noted by the Clerk of the Court on February 1, 1989. A hearing with respect to plaintiff's motion was scheduled for March 30, 1989 at which time defendant, despite adequate notice, failed to appear.

The complaint states a cause of action based on breach of contract for the failure to pay amounts due and owing for the purchase and delivery of aviation equipment. Such purchases fall within the "commercial activities" exceptions to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) ("FSIA"). See Letelier v. Republic of Chile, 748 F.2d 790, 797 (2d Cir. 1984) (commercial activity "is of the type an individual would customarily carry on for profit"); Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1379 (5th Cir. 1980) (activity is commercial if "the particular conduct giving rise to the claim in question actually constitutes or is in connection with commercial activity, regardless of the defendant's generally commercial or governmental character"). The purchase of aviation equipment constitutes such commercial activity, therefore, the FSIA does not bar entry of default judgment.

Plaintiff seeks the amount of $983,696.60, representing the unpaid balance of the account plus contractual interest to the date of the complaint. Plaintiff's motion is unopposed, and the claim is supported by the proof submitted.

SO ORDERED.

The Clerk of the Court is directed to enter judgment for the plaintiff and against the defendant in the amount of $983,696.60.

/S/

U. S. D. J.

APPENDIX C

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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x

TRANSAERO, INC.,

Plaintiff

-against-

DEFAULT
JUDGMENT
CV 88 2788 (JM)

LA FUERZA AEREA BOLIVIANA,
an Instrumentality of
THE REPUBLIC OF BOLIVIA,
a Foreign State,

Defendants.

---x

A memorandum of decision and order of Hon. Jacob Mishler, United States District Judge, having been filed on April 24, 1989, granting plaintiff's motion for the entry of a default judgment against the defendant, and directing the Clerk of the Court to enter judgment in favor of the plaintiff and against the defendant in the amount of $983,696.60, it is

ORDERED and ADJUDGED that the plaintiff Transaero, Inc. shall recover of the defendant La Fuerza Aerea Boliviana, an Instrumentality of The Republic of Bolivia, a Foreign State, the sum of $983,696.60.

Dated: Uniondale,
New York
April 28, 1989

ROBERT C. HEINEMANN
Clerk of the Court

By:
JOSEPH DI TALIA
Deputy Clerk-in-Charge

APPENDIX D

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRANSAERO, INC.,

Plaintiff,

v.

LA FUERZA AEREA BOLIVIANA,
an instrumentality of THE
REPUBLIC OF BOLIVIA,

Defendant.

Misc. Action
No. 91-0139
(GHR)

ORDER

Before the Court, as a motions matter, is the summary judgment motion of defendant La Fuerza Area Boliviana ("La Fuerza") to quash interrogatories and dismiss proceedings. Defendant is the air force of the Republic of Bolivia. It is also the judgment debtor on a default judgment entered on April 28, 1989, in an action entitled Transaero, Inc. v. La Fuerza Aerea Boliviana, an Instrumentality of the Republic of Bolivia, a Foreign State, No. CV 88-2788, filed in the United States District Court for the Eastern District of New York, and subsequently registered in this district court under 28 U.S.C. § 1963. Through the motion now before the Court, La Fuerza seeks to collaterally attack the default judgment upon which the interrogatories are based, on the grounds that the district court in New York lacked personal jurisdiction under the Foreign

Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA") to enter a default judgment in the first place. The motion has been fully briefed. The dispute presents a mixed issue of law and fact which may be resolved on the record before the Court without resort to further proceedings.

The dispositive issue is whether service was proper under the terms of Section 1608 of the FSIA, which governs service of process on foreign states. See 28 U.S.C. §§ 1608(a), (b). This issue in turn depends on whether, under this provision, La Fuerza is "a foreign state or political subdivision of a foreign state" to be served in accordance with the requirements of Section 1608(a), or "an agency or instrumentality of a foreign state" to be served in accordance with the somewhat less strict requirements of Section 1608(b). La Fuerza contends that it is an integral part of the Bolivian state and thus can be served only under Section 1608(a).

Plaintiff Transaero, Inc. ("Transaero") served La Fuerza under Section 1608(b) on the theory that the Bolivian Air Force is an instrumentality of the Bolivian state.[1] There is no dispute that La Fuerza received actual notice of Transaero's lawsuit in accordance with the terms of that provision. Nevertheless, La Fuerza did not appear in the action. A default was noted and Transaero moved for a default judgment. Transaero's motion was heard before the Hon. Jacob Mishler in the United States District Court for the Eastern District of New York on March 30, 1989. Although it was notified by mail, see Def.'s Exh. F; Pl.'s Exh. D, La Fuerza did not appear at this hearing either. By

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[1] Transaero is a New York corporation which brought the action in the Eastern District of New York to recover an unpaid balance and accrued interest of $983,696.60 allegedly owed it from the sale of aviation equipment to La Fuerza. Jurisdiction was based on 28 U.S.C. § 1330.

Memorandum of Decision and Order dated April 21, 1989, Judge Mishler found that 1) the summons and complaint were properly served in accordance with Section 1608(b) of the FSIA, 2) the complaint stated a cause of action for breach of contract, 3) the suit concerned purchases undertaken by La Fuerza within the "commercial activities" exception to sovereign immunity under the Section 1605(a)(2) of the FSIA, 4) default judgment was not barred by the FSIA, and 5) Transaero's proof of claim supported judgment against La Fuerza in the amount of $983,696.60. See Def.'s Exh. D. Judge Mishler accordingly granted Transaero's motion and entered default judgment in that amount.

In ruling that La Fuerza had been properly served under the FSIA, Judge Mishler referred to defendant as "an instrumentality of the Republic of Bolivia." Id. Although this Court is not bound to defer to that conclusion, and may thus entertain La Fuerza's collateral attack on personal jurisdiction, see Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543, 1547 (D.C. Cir. 1987); 18 Charles Alan Wright, et al., Federal Practice & Procedure, 4430 at 292-94 (1981 & Supp. 1992), the Court does not believe that Judge Mishler's finding -- that La Fuerza had been properly served -- was mistaken.

While the FSIA provides a three-part definition of "agency or instrumentality of a foreign state," see 28 U.S.C. § 1603(b), the crux of that definition for the purposes of this case is whether the entity in question "is a separate legal person, corporate or otherwise." 28 U.S.C. § 1603(b)(1).[2] A

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[2] Again, it is undisputed that La Fuerza is "an organ of a foreign state or political subdivision thereof," 28 U.S.C. § 1603(b)(2), and that it is "neither a citizen of a State of the United States . . . nor created under the laws of any third country." 28 U.S.C. § 1603(b)(3).

review of the caselaw shows that, in interpreting this language, courts look to whether the entity can sue or be sued in its own name, whether the entity can enter into contracts in its own name, or whether the entity is capable of holding property in its own name under the law of the foreign state where it was created, as indicia of separateness under Subsection 1603(b)(1). See Marlowe v. Argentine Naval Comm'n, 604 F. Supp. 703, 706-7 (D.D.C. 1985); Unidyne Corp. v. Aerolineas Argentinas, 590 F. Supp. 398, 400 (E.D. Va. 1984). This analysis finds support in the legislative history of Section 1603, which provides the following additional guidance:

> As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R. Rep. No. 94-1487, at 15-16 (emphasis added).

With these considerations in mind, it is apparent to this Court that La Fuerza is an "agency or instrumentality" of the Bolivian state for the purposes of applying Section 1608 of the FSIA. La Fuerza clearly has capacity to sue and be sued in its own name, as cases in other jurisdictions demonstrate. See, e.g., Shapiro v. Republic of Bolivia, 930 F.2d 1013 (2nd Cir. 1991). (The Bolivian Air Force named as a defendant in addition to the Republic of Bolivia); Office of the Comptroller General v. International Promotions and Ventures, Ltd., 618 F.

Supp. 202, 203 n. 1 (S.D.N.Y. 1985) (Suit brought on behalf of the Bolivian Air Force). And La Fuerza clearly has capacity to enter into contracts in its own name, as the contract in this case and contracts in other cases demonstrate. See Decl. of General Dardo Gomez Garcia ¶ 8, Def.'s Exh A; Def.'s Exh. D (Letter of April 14, 1987, to Anthony Caputo); Office of the Comptroller General, 618 F. Supp. at 203.

If La Fuerza is an instrumentality of the Bolivian state, it follows, under the undisputed facts of this case, that Judge Mishler was correct in determining that service was proper under 28 U.S.C. § 1608(b). And if service was proper under the FSIA, it likewise follows that Judge Mishler's court had personal jurisdiction over La Fuerza. That being the case, it is unnecessary to address the substantial compliance issue raised by Transaero. Defendant having asserted no other grounds for challenging personal jurisdiction, it is accordingly.

ORDERED, that defendant's Motion for Summary Judgment to Quash Interrogatories and to Dismiss Proceedings is DENIED.

9/25/92

DATE

GEORGE H. REVERCOMB
UNITED STATES DISTRICT JUDGE

APPENDIX E

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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TRANSAERO, INC.,

Plaintiff 88-CV-2788

-against- Memorandum of Decision and Order

LA FUERZA AEREA BOLIVIANA,
an Instrumentality of
THE REPUBLIC OF BOLIVIA,
a Foreign State,

Defendant August 12, 1993

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APPEARANCES:

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Timothy S. Driscoll, Esq., of counsel

MISHLER, District Judge

Defendant, La Fuerza Aerea Boliviana ("Air Force"), moves pursuant to Fed. R. Civ. P. 60(b) to set aside the default judgment entered in the above captioned case on April 28, 1989, pursuant to this Court's Memorandum of Decision and Order dated April 24, 1989. Defendant also moves pursuant to Fed. R. Civ. P. 62(b) for a stay of execution of the default judgment pending this Court's consideration of Defendant's motion to set aside judgment. Finally, Defendant moves to dismiss Plaintiff Transaero, Inc.'s ("Transaero") complaint with prejudice and to award Air Force attorney's fees and costs incurred in defending the default judgment and making this motion. Plaintiff cross moves for Rule 11 sanctions against Defendant for bringing the instant motion.

For the reasons set forth below, Defendant's motions are denied in their entirety and Plaintiff's motion for Rule 11 sanctions is also denied.

BACKGROUND

This case arises out of an alleged breach of a credit agreement entered into between Transaero, a supplier of aircraft parts, and the Air Force in May 1981. The credit agreement created an open account upon which Air Force could make purchases from Transaero. The agreement

required the Air Force to pay interest of 1 3/4% per month (21% per annum) on all purchases not paid within 120 days of shipment. From June 22, 1981 until April 14, 1982, the Air Force ordered and accepted delivery of certain aviation equipment and thereby accumulated a principal balance of $598,115.76. The Air Force made no payments until October 30, 1984 when it made a payment to Transaero of $381,688.29. The Air Force claims that this payment was credited against the principal balance of $598,115.76, exclusive of any accumulated interested owed, leaving a principal amount due of $216,427.47.

On or about January 6, 1986, after several weeks of negotiations between the parties, the Air Force made a second payment to Transaero of $266,427.47. The Air Force claims that under the terms of an agreement between the parties, this payment represented a final payment and a full settlement of its account with Transaero: $216,427.47 in owed principal and $50,000 in nominal interest. Transaero rejects this characterization, claiming that the payment represented only a partial settlement and that the Air Force still owed several hundred thousand dollars in unpaid interest and/or principal. Accordingly, Transaero continued to charge Air Force interest on this unpaid debt through the time this case was filed in 1988. The Air Force made no further payments to Transaero.

On or about September 8, 1988, Transaero, by its attorney Jacobs, filed a verified compliant seeking $983,696.60 in damages from the Air Force based upon the following theories: (1) "goods sold and delivered and accrued interest on the unpaid balance," (2) "account stated," (3) "beach of the Finance Agreement," (4) "interest accruing on the unpaid balance of $598,115.76 for 86 months." (Complaint ¶ 12-17.) In connection with the filing

of the complaint, Jacobs submitted two certifications, the first dated September 8, 1988, and the second dated October 5, 1988, and an affidavit dated January 25, 1989 ("Jacobs Affidavit").

Air Force failed to serve and file an answer or enter an appearance. Subsequently, Transaero moved for a default judgment. On March 30, 1989 we held a hearing on Transaero's motion. In a Memorandum of Decision and Order dated April 21, 1989, we granted Transaero's motion for a default judgment and directed the Clerk of the Court to enter a default judgment for Transaero against Air Force in the amount of $983,696.60. In our Memorandum of Decision and Order we found the following: (1) the summons and complaint were properly served upon Air Force in accordance with 28 U.S.C. § 2608(b)(3)(B); (2) Air Force had adequate notice of the hearing scheduled for March 30, 1989, but failed to enter an appearance; (3) the complaint stated a cause of action based on breach of contract for Air Force's failure to pay amounts due and owing for the purchase and delivery of aviation equipment; (4) Air Force was not entitled to Sovereign Immunity under the Foreign Sovereign Immunities Act because its purchases of the aviation equipment constituted "commercial activities" within the "commercial activities" exception of 28 U.S.C. § 1605(a)(2) of the FSIA; (5) Transaero's claim was supported by the proof submitted. A default judgment was entered by the Clerk of the Court on April 28, 1989.

The Air Force now moves, more than 4 years later, to have the $983,696.60 judgment set aside on the grounds that the judgment was obtained by a fraud on the court. Air Force states:

> [T]he Court based its opinion on a sworn affidavit executed by plaintiff's counsel that,

> in its numerous misrepresentations of fact and law, constituted a fraud upon the court. [And] Plaintiff's counsel, on two separate occasions, certified falsely to facts necessary to establish this Court's subject matter jurisdiction.

(Def. Mem. Law at 1.)

DISCUSSION

1. Rule 60(b)

Rule 60(b) reads in pertinent part as follows:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged . . . or (6) any other reason justifying relief form the operation of the judgment.

Fed. R. Civ. P. 60(b).

In considering a Rule 60(b) motion, we must balance the policy in favor of hearing a litigant's claims on the merits against the policy in favor of finality. Kotlicky v. United States Fidelity & Guaranty Co., 817 F.2d 6, 9 (2d Cir. 1987) (citing 11 C. Wright & A. Miller, Federal Practice and Procedure § 2857 (1973)). All Rule 60(b) motions must be made within a reasonable time and motions under Rule 60(b)(1), (2), and (3) must be made within one year after

the judgment. Id. Under the saving clause of subsection (6), relief from a final judgment may also be obtained at any time by way of an independent action to set aside a judgment for "fraud on the court." See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944); Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 (2d Cir.), cert. denied, 409 U.S. 883 (1972) (Rule 60(b) imposes "no time limit" for claim of fraud on the court.).

"Although both clause (3) and the saving provision of Rule 60(b) provide for relief from a judgment on the basis of fraud, the type of fraud necessary to sustain an independent action attacking the finality of judgment is narrower in scope than that which is sufficient for relief by timely motion." Gleason v. Jandrucko, 860 F.2d 556, 558 (2d Cir. 1988)(citations omitted). "'Fraud on the court' is limited to fraud which seriously affects the integrity of the normal process of adjudication." Gleason, 860 F.2d at 559 (citing Kupferman v. Consolidated Research & Mfg. Corp., 459 1072, 1078 (2d Cir. 1972)). Fraud on the court involves conduct which "threatens the very integrity of the judiciary and the proper administration of justice." Id, (citing Hazel-Atlas, 322 U.S. at 246, 64 S.Ct. at 1001). The cases where it has been found have involved the most egregious conduct involving "corruption of the judicial process itself." 11 C. Wright and A. Miller, Federal Practice and Procedure § 2870 (1973). "Generally, courts require that the evidence in support of the motion to vacate a final judgment be 'highly convincing,' that a party show good cause for the failure to act sooner and that no undue hardship be imposed on other parties." Kotlicky, 817 F.2d at 9 (citing United Stated v. Cirami, 563 F.2d 26, 32 (2d Cir. 1972).

2. Defendant's Allegations Of Fraud

The Air Force claims that Transaero's attorney,

Jacobs, committed a fraud on the court by submitting an affidavit and certifications containing numerous false statements and misrepresentations. Further, Air Force alleges that the court relied on these false statements in granting Transaero's motion for entry of default judgment.

Air Force makes the following allegations: (1) the Jacobs Affidavit falsely represented that Transaero's claim was for "goods sold and delivered, account stated, and breach of finance agreement," when in fact Transaero's claim was for contract interest only; (2) the Jacobs Affidavit, in calculating the interest allegedly owed, violated the terms of the Finance Agreement and New York law by charging compound interest; (3) Jacobs failed to inform the Court that the applicable statute of limitations had expired and that, therefore, Transaero's claim was time barred; (4) Jacobs failed to disclose that Transaero's acceptance of the second payment of $266,427.47 represented a final settlement of any and all obligations of Air Force to Transaero.

a. Nature and Amount of Claim

Air Force contends that its January 1986 payment of $266,427.47 extinguished its principal debt to Transaero. As evidence, it points to statements of account wherein the payment is shown credited against principal and not against accumulated interest and to various cables and letters between the parties discussing the payment. Consequently, Air Force argues that any amounts allegedly still owing to Transaero consisted of unpaid accumulated interest. Nonetheless, in its complaint and supporting affidavit, Transaero claimed that Air Force owed principal for goods sold and delivered. This misrepresentation, Air Force claims, mislead the Court into finding diversity jurisdiction where none existed and waiving arbitration where it should

have been required.

This Court has jurisdiction in diversity cases where the amount in controversy exceeds $50,000 "exclusive of interest and costs." 28 U.S.C. § 1332(a). Air Force argues that unpaid accumulated interest it allegedly owed should have been excluded from the calculation of the amount in controversy as "interest." Air Force claims that Jacobs, by falsely stating that the claim was for "goods sold and delivered", fraudulently mislead the Court into finding subject matter jurisdiction when, in fact, the amount in controversy, exclusive of interest and costs, was less than $50,000.

Similarly, Air Force alleges that Jacobs fraudulently mislead the court into waiving mandatory arbitration. Local Arbitration Rule 3(A) makes arbitration mandatory in civil cases where the amount in controversy "exclusive of interest and costs" is less than $100,000.00. Jacobs' aim in avoiding arbitration, according to Air Force, was to avoid a forum where the true nature of Transaero's claim would come to light.

As an initial matter, we note that all of the documentary evidence relied on by Air Force in making its allegation of fraud were submitted by Jacobs in connection with Transaero's motion for a default judgment. The various letters, cables and statements of account were part of the record and available for our review. The record reveals a contract for goods, a finance agreement, and statements of account from Transaero requesting payment of accrued interest from Air Force. The complaint and Jacobs affidavit offer one plausible interpretation of these documents. Air Force suggests that by not offering a different interpretation, one favorable to its case, Jacobs committed a fraud upon the court. Air Force's accusations

are without merit.

Air Force's interpretation of 28 U.S.C. § 1332(a) is in error. Where interest owed is part of an underlying contractual obligation, unpaid interest can be said to become part of the principal demand in a suit based on the contract. See Brown v. Webster, 156 U.S. 328, 330, 15 S. Ct. 377 (1895); Edwards v. Bates County, 163 U.S. 269, 16 S. Ct. 967 (1895) ("[W]hen the interest evidenced by a coupon has become due and payable, the demand based upon the promise contained in such coupon is no longer a mere incident of the principal indebtedness represented by the bond, but becomes really a principal obligation."). We find that Jacobs had a legal basis upon which he represented that the claim was for "goods sold and delivered, account stated, and breach of finance agreement" and that the principal amount in controversy exceeded $50,000. The interest claimed by Transaero constituted a principal claim and was not excludable "interest" within the meaning of the 28 U.S.C. § 1332(a). Therefore, we properly exercised subject matter jurisdiction in this case. Moreover, the local rules did not mandate arbitration and, therefore, the case was ripe for adjudication.

We find no convincing evidence that Jacobs perpetrated a fraud on the court in the manner described above. Air Force offers nothing more than an alternative interpretation of the documentary evidence from that offered by Jacobs and ultimately accepted by this Court. The arguments it offers are simply those it could have brought foward at the 1989 hearing, but choose not to.

b. Compound Interest

Air Forces alleges that the $983,696.60 claimed by Transaero in its complaint and ultimately awarded in the default judgment was calculated according to terms that

violated the finance agreement and which constitute illegal compound and usurious interest. In support of its position, Air Forces offers the same documentary record discussed above, which was available to the court for review. In addition, it offers the calculations of its accounting firm which it says show that "had the Jacobs Affidavit abided by the express terms of the contract and settled New York law, the actual amount owed in the default judgment would have been $234,835.93." (Def. Mem. of Law at 27.) This claim contradicts Air Forces earlier claim that Transaero's claim failed to meet the minimum amount in controversy requirement of 28 U.S.C. § 1332(a) and its claim that the 1986 payment represented a full settlement.

Specifically, Air Force claims that Jacobs' interest calculations violated the terms of the finance agreement in several ways: (1) charging interest before Air Force's payment for equipment was due; (2) charging interest after Air Force had tendered full payment on the principal debt; (3) charging a rate of interest greater than the contractual 21% per annum; and (4) charging interest on amounts above those subject to the contract rate of interest. Also, the Jacobs affidavit allegedly charged illegal compound interest, See Newburger-Morris Co. v. Talcott, 219 N.Y. 505 (1916), and criminal usurious interest. See N.Y. Penal Law § 190.40 (McKinney 1989).

Air Force brings forth no evidence of bad faith or dishonesty by Jacobs beyond the alleged miscalculations. Air Force does not allege that Jacobs altered or withheld any relevant documents from the record. Air Force strains our credulity when it asks us to believe that Jacobs intentionally miscalculated the amount of the claim but nevertheless submitted documents which upon inspection would reveal the error, expecting that neither the Court nor

the Air Force would discover his duplicity.

Transaero argues that the finance agreement, statements of account, and communications between the parties can be read to support Jacobs' interest calculations. For example, Transaero claims that Air Force accepted Transaero's interpretation of the debt owed by failing to object to statements of account containing the interest charges. See In Re Magnus Harmonica Corporation, 262 F.2d 525 (3rd Cir. 1959). Also, Transaero states that, from a letter preceding the 1986 payment, it can be argued that Air Force understood that Transaero would continue to charge it interest on the unpaid balance. Finally, Transaero notes that under New York law, courts will enforce a promise to pay compound interest, if made after simple interest has accrued, provided that there is some other consideration to make the promise good. See Newburger-Morris Company v. Talcott, 114 N.E. 84 (N.Y. Ct. App. 1916).

Considering Transaero's arguments, we conclude that there was no fraud on the court. We find that Jacobs had a legal and factual basis upon which he could in good faith represent to the court that Air Force was indebted to Transaero in the amount of $983,696.60. Whether his affidavit correctly recounts the law and facts is not the issue. The time has passed when this Court will consider the merits of Transaero's claim. The only issue before us is whether the default judgment was obtained by fraud. We find that Air Force has failed to bring forth convincing evidence that Jacobs' calculation of interest payments constituted a fraud on the court.

c. Statute Of Limitations

Air Force argues that in July 1988, when Transaero file its complaint, Transaero's claims were barred by the

four year statute of limitation governing the sale of goods under New York's version of the Uniform Commercial Code. Air Force claims that Jacobs committed fraud on the court by failing to disclose this fact to the Court. This is, at most, an argument to set aside judgment on the ground of mistake of law pursuant to 60b(1). Of course, at this time, any claim of mistake is barred: the the one year limitation having expired. Thus, Air Force may be understood to be making the insupportable argument that where an attorney fails to raise a legal argument helpful to the opposing party's case, he has committed a fraud on the court.

Air Force presents no evidence that jacobs misled this court with regard to the applicable statute of limitations. Moreover, Transaero notes that actions for an account stated are governed by a six year statute of limitations. See N.Y. Civ. Prac. L. & R. § 213(2) (McKinney 1989). Since the statute begins to run on the day of the statement, it can be fairly argued that Transaero's claim under that theory was not time barred. Similarly, it can be argued that Air Force acknowledged its debt in a March 17, 1987 letter (Plaintiff's Exh. 10) and that a new limitations period arose at that time. See NY Gen. Oblig. Law §17-101 (McKinneys 1989).

d. Settlement

Air Force argues that the documentary evidence clearly establishes that its 1986 payment to Transaero fully and completely settled any outstanding debt it might have owed. Air Force accuses Jacobs of fraud for failing to disclose this fact to the court. Again, Air Force has failed to offer any convincing proof of fraud. The documents that Air Force claims clearly indicate a final settlement were submitted by Jacobs and available to the Court for review. While we do not now pass on whether a final settlement was

entered into, the evidence is sufficient to support a reasonable argument that the 1986 payment represented only a partial settlement of the dispute. Therefore, Jacobs did not misrepresent the record, he simply offered a version of the record in presenting his client's case. No fraud was committed.

CONCLUSION

For the reasons set forth above, Defendant La Fuerza Aerera Boliviana's motions to set aside the judgment, to stay execution of the judgment, to dismiss the complaint, and to grant fees and costs are denied in their entirety. Plaintiff, Transaero, Inc.'s, motion to impose Rule 11 sanctions on Defendant is also denied. And it is

SO ORDERED.

Jacob Mishler
U. S. D. J.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1063—August Term, 1993

Argued: February 22, 1994 Decided: May 19, 1994

Docket No. 93-7903

TRANSAERO, INC.,

Plaintiff-Appellee,

—against—

LA FUERZA AREA BOLIVIANA, an instrumentality of the Republic of Bolivia, a Foreign State,

Defendant-Appellant.

Before:

NEWMAN and VAN GRAAFEILAND, *Circuit Judges*, and LASKER, *District Judge**.

Appeal from a decision of the United States District Court for the Eastern District of New York, Jacob Mishler, *Judge*, denying relief under Rule 60(b) of the Federal

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* Hon. Morris E. Lasker, *Judge*, United States District Court for the Southern District of New York, sitting by designation.

Rules of Civil Procedure from a default judgment entered against defendant-appellant, La Fuerza Aerea Boliviana, on April 28, 1989.

Remanded for the limited purpose of assessing the mathematical accuracy of the default award to plaintiff-appellee, Transaero, Inc.

RONALD N. COBERT, Washington, D.C. (Grove, Jaskiewicz and Cobert, Andrew M. Danas, of counsel) *for Plaintiff-Appellee.*

GREGORY B. CRAIG, Washington, D.C. (Williams & Connolly, James W. Shannon, Jr., of counsel) *for Defendant-Appellant.*

LASKER, *District Judge*:

The Air Force of the Republic of Bolivia ("BAF") appeals from a decision of the United States District Court for the Eastern District of New York, Jacob Mishler, Judge, which denied its motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure from a default judgment entered against it on April 28, 1989.

The appeal from the order denying Rule 60(b) relief brings up for review only the denial of the motion and not the merits of the underlying default judgment. *Branum v. Clark*, 927 F.2d 698, 704 (2d Cir. 1991). The standard for

review is abuse of discretion. *Id.* For the reasons discussed below, we conclude that there was no abuse, but we remand for the limited purpose of assessing the mathematical accuracy of the default award to Transaero, Inc.

BACKGROUND

The action arises out of the alleged breach of a credit agreement between Transaero, a supplier of aircraft parts, and the Bolivian Air Force entered in May 1981. For a number of years before May 1981, Transaero had been selling aircraft parts to BAF, but had been experiencing delays in payment on outstanding invoices averaging six to twelve months. As a result, the present agreement was drafted to require BAF to pay 1.75% monthly interest (21% per year) on all purchases not paid within 120 days of shipment. By April 14, 1982, the Bolivian Air Force had accumulated an outstanding principal balance of $598,115.76.

On September 8, 1988, despite intervening payments by the Bolivian Air Force totalling $648,115.76, Transaero filed suit to collect $983,696.60 for outstanding principal and interest. The Bolivian Air Force failed to answer the complaint or to enter an appearance at a hearing scheduled by Judge Mishler for March 30, 1989 which resulted in an inquest on damages.[1] On April 28, 1989, the Clerk of the Court entered a default judgment for Transaero in the amount requested. On May 12, 1993, over four years

[1] It is BAF's position that it defaulted because it lacked proper notice of Transaero's complaint and of the hearing. Judge Mishler found to the contrary in his Opinion of April 21, 1989 directing entry of the default judgment and so did the late Judge Revercomb in a separate proceeding in the District Court of the District of Columbia. BAF's appeal of Judge Revercomb's Order of September 25, 1992 is now pending in the Circuit Court for the District of Columbia.

later, BAF moved to set aside the default judgment under Rule 60(b). On August 12, 1993, Judge Mishler denied the motion.

DISCUSSION

BAF's primary argument on appeal is based on the so-called saving clause of Rule 60(b) which provides that "[t]his rule does not limit the power of a court . . . to set aside a judgment for fraud upon the court." BAF argues that there has been a fraud on the court in this case because Transaero's counsel allegedly submitted a fraudulent affidavit in support of the 1989 motion for entry of the default judgment and the district court relied on the false statements made there in granting the motion.

BAF also argues that the default judgment should be set aside under clause (4) of Rule 60(b) which provides that, within a reasonable time from the time of judgment, "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a judgment [where] the judgment is void." Fed. R. Civ. P. 60(b)(4). The basis for this claim is BAF's contention that the district court lacked subject matter jurisdiction to enter the default judgment because Transaero's claim was not first submitted to compulsory arbitration, which, BAF maintains, was required in this case by the Local Rules of the Eastern District of New York.

Finally, BAF argues that the default judgment should be set aside under the catch-all clause of Rule 60(b) which provides for relief for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). BAF claims that Rule 60(b)(6) relief is warranted because of the district court's alleged failure to

comply with section 1608(e) of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602-11 (1994), which prohibits default judgments against foreign states unless the claimant establishes the right to relief by evidence satisfactory to the court and requires a copy of any default judgment to be sent to the foreign state. BAF also points out the disfavor with which courts view default judgments, especially those against foreign sovereigns. *First Fidelity Bank, N.A. v. Government of Antigua & Barbuda–Permanent Mission*, 877 F.2d 189, 196 (2d Cir. 1989).

The Claim of Fraud on the Court.

BAF points to a string of representations made by Transaero's counsel in his affidavit in support of the 1989 motion for entry of the default judgment which, BAF maintains, were fraudulent. BAF charges that the affidavit falsely labelled Transaero's claim as one for principal and interest, when it was really for interest only; sought compound interest in violation of New York law; claimed interest for a longer period, at a higher rate and on a greater amount than authorized by the credit agreement and New York law; and sought judgment on a breach of contract claim, even though it was time-barred.

Fraud on the court is "fraud which seriously affects the integrity of the normal process of adjudication." *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir. 1988). It involves "far more than an injury to an individual litigant" or "a case of a judgment obtained [simply] with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury." *Id.* (citations omitted) (alteration in original). The concept embraces "that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform

in the usual manner its impartial task of adjudging cases presented for adjudication." *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972) (quoting 7 Moore's Federal Practice ¶ 60.33, at 515 (1971 ed.)).

The representations by plaintiff's counsel specified above did not constitute a fraud on the court. For example, Transaero had a good faith basis for believing that BAF had acknowledged Transaero's entitlement to compound interest because BAF failed to make timely objections to Transaero's invoices and had made partial payments on its debt in 1984 and 1986. Similarly, Transaero had a good faith basis for believing that its breach of contract claim was not time-barred when it filed suit in September 1988, since the limitations period was not obviously triggered until BAF repudiated the payments Transaero claimed under the credit agreement in April 1987—well within the four year limitations period governing the sale of goods under the U.C.C. Finally, as discussed below in the section on BAF's claim under Rule 60(b)(4), there is no merit to BAF's claim that, because Transaero's claim was for interest only, the district court lacked jurisdiction to enter the default judgment.

Moreover, BAF has presented no evidence of bad faith or dishonesty by Transaero's counsel. Indeed, as the district court points out in its opinion below, all the documentary evidence on which BAF now bases its claim of fraud on the court was submitted to the district court itself by Transaero's counsel in connection with the very motion for entry of the default judgment. The up-front submission of this documentary evidence fundamentally undermines BAF's claim of fraud on the court. BAF's response to this point—that a busy district judge cannot be

expected to sort through a disorganized record—is unpersuasive.

The Rule 60(b)(4) Claim.

The Local Rules of the Eastern District of New York, where the default judgment was entered, require the Clerk of the Court to "designate and process for compulsory arbitration all civil cases . . . wherein money damages only are being sought in an amount not in excess of $100,000.00 exclusive of interest and costs." N.Y. Rules of Court, App. C §3(A), at 797 (McKinney 1994). BAF argues that, since Transaero's claim is one for interest only, the claim ought to have been submitted to arbitration pursuant to the local rule. BAF maintains that, because the case was not arbitrated as allegedly required, the case was was not ripe for review and the district court lacked subject matter jurisdiction to decide it. Hence, according to BAF, the judgment is void and should be set aside under Rule 60(b)(4) of the Federal Rules of Civil Procedure.

Invoices submitted by Transaero to the Bolivian Air Force show that Transaero applied the Air Force's last payment to the outstanding principal debt and that, apparently, from that time on, BAF owed interest only. In *Edwards v. Bates County*, 163 U.S. 269 (1896), the Supreme Court held that, for purposes of calculating the adequacy of the amount in controversy for diversity jurisdiction under a predecessor statute to 28 U.S.C. § 1332(a), the circuit court should have included the value of the matured interest coupons attached to the bonds issued by the defendant. The Supreme Court stated that "when the interest evidenced by a coupon has become due and payable the demand based upon the promise contained in such coupon is no longer a mere incident of the

principal indebtedness represented by the bond, but becomes really a principal obligation." *Id.* at 272.

It seems clear under *Edwards* that where, as here, interest is owed as part of an underlying contractual obligation, unpaid interest becomes part of the principal for jurisdictional purposes. We see no reason to treat such interest differently for purposes of determining the scope of compulsory arbitration under the Local Rules of the Eastern District of New York and conclude that arbitration was not required in this case.

The Rule 60(b)(6) Claim.

Clause (6) provides "a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses." 7 Moore's Federal Practice ¶ 60.27[2], at 295 (2d ed. 1993). In a proper case, it is to be "liberally applied." *Id.* at 273. Nevertheless, relief under Rule 60(b)(6) is available only in "extraordinary circumstances." *Ackermann v. United States*, 340 U.S. 193, 199 (1950).

BAF argues that such circumstances exist in this case because of the district court's alleged failure to comply with the requirements of Section 1608(e) of the Foreign Sovereign Immunities Act which provides that:

> No judgment by default shall be entered by a court of the United States or of a State against a foreign state . . . or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or riactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C. § 1608(e). BAF contends first that Transaero failed to "establish [its] claim or right to relief by evidence satisfactory to the court" and second that, despite the notice requirement of section 1608(e), it was not informed of the default judgment until almost three years after the judgment was entered.

The purpose of the evidentiary requirement of section 1608(e) is to assure that foreign sovereigns, who sometimes are slow to respond to legal action, are protected from unfounded claims. *See Marziliano v. Heckler*, 728 F.2d 151, 157-58 (2d Cir. 1984) (attributing this rationale to the identical requirement for judgments against the United States under Fed. R. Civ. P. 55(e)). However, no such concerns exist in this case because Judge Mishler held an inquest on the question of damages, and his Order of April 21, 1989, directing entry of the default judgment, determined specifically that the complaint "state[d] a cause of action, based on breach of contract," the claim "f[ell] within the 'commercial activities' exception to the Foreign Sovereign Immunities Act" and was "supported by the proof submitted."

Nor, in the circumstances of this case, does the fact that BAF did not learn of the entry of the default judgment for several years constitute "extraordinary circumstances" justifying Rule 60(b)(6) relief. "Lack of notice [of a judgment] does not *ipso facto* mean that a judgment can or should be reopened" and "granting of such motions should be considered only where lack of notice has operated to prejudice a substantial right or remedy that would otherwise be available." *Radack v. Norwegian Am. Line Agency, Inc.*, 318 F.2d 538, 542-43 (2d Cir. 1963).

In the case at hand, the delay of notice of the default judgment did not "operate[ ] to prejudice a substantial

right or remedy." It is true that, as a result of the passage of time since entry of the default judgment, BAF cannot now seek relief under subsections (1), (2) and (3) of Rule 60(b) because these provisions cannot be invoked more than one year after entry of judgment. However, it is not true that, but for the notice delay, BAF could have asserted a timely claim under any one of these subsections.

The Affidavit of General Dardo Gomez Garcia states that "[p]rior to February 28, 1992, the Bolivian Air Force was not aware that . . . a Default Judgment had been entered" against BAF and the implication is plain that, from that date forward, BAF was aware of the default judgment. However, BAF did not make its Rule 60(b) motion until over one year later in May 1993. Accordingly, even if BAF had received prompt notice of the default judgment, BAF's potential claims under subsections (1), (2) or (3) would still have been time barred because BAF sat on its hands for over a year.

Finally, relying on *First Fidelity Bank, N.A. v. Government of Antigua & Barbuda-Permanent Mission*, 877 F.2d 189, 196 (2d Cir. 1989), BAF argues that the default judgment should be set aside under Rule 60(b)(6) because "default judgments are disfavored, especially those against foreign sovereigns." *Id.* at 196. It is true that the *First Fidelity Bank* court stated that "[c]ourts go to great lengths . . . to permit [default] judgments against foreign sovereigns to be set aside." *Id.* But *First Fidelity Bank* was a distinctly different case than the one at hand. The issue in *First Fidelity Bank* was the extent to which the foreign sovereign defendant was bound by the actions of its ambassador to the United Nations and whether the district court had jurisdiction in the circumstances. This was a case which had "serious implications for the relation-

ships between the United States and all foreign states that send duly accredited ambassadors to head their diplomatic missions in this country." *Id.* at 196-97 (Newman, J., dissenting). The case before us is fundamentally an ordinary contract dispute which has no such profound implications.

* * *

Although we conclude that the district court properly denied BAF's Rule 60(b) application, there remain two questions raised by BAF as to the accuracy of the interest calculation on which the award to Transaero was based, neither of which has been specifically answered by Transaero. First, BAF contends in its brief on appeal that interest cannot have accrued against it for 86 months—as Transaero claimed in the complaint—because a period of 86 months allegedly would have commenced before BAF made its first purchase from Transaero on June 22, 1981. Second, BAF presents evidence on this motion that Transaero's interest calculations were incorrect and ranged from 20.99% per year to 26.34% per year. (Barker Aff. ¶18). We remand for the limited purpose of assessing the factual accuracy of the two claims described above and, if necessary, recalculating the award to Transaero accordingly.

CONCLUSION

The district court did not abuse its discretion in denying BAF's application to set aside the default judgment under Rule 60(b) of the Federal Rules of Civil Procedure. We remand for the limited purpose of re-examining the mathematical accuracy of the award to Transaero. Transaero's application for damages, including attorneys' fees and costs on appeal, is denied.

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 1993

Petition for Rehearing Decided: October 19, 1994
Submitted: September 28, 1994

Docket No. 93-7903

TRANSAERO, INC.,

Plaintiff-Appellee,

—v.—

LA FUERZA AEREA BOLIVIANA, AN INSTRUMENTALITY OF THE REPUBLIC OF BOLIVIA, A FOREIGN STATE,

Defendant-Appellant.

Before:

NEWMAN, *Chief Judge,*
VAN GRAAFEILAND, *Circuit Judge,*
and LASKER,* *District Judge.*

---

* The Honorable Morris E. Lasker of the United States District Court for the Southern District of New York, sitting by designation.

Petition for rehearing of the May 19, 1994, decision, 24 F.3d 457, affirming District Court's denial of a motion, pursuant to Fed. R. Civ. P. 60(b).

Petition granted only to the limited extent of broadening the remand to include consideration of the cessation of interest, and is otherwise denied; mandate is stayed.

JON O. NEWMAN, *Chief Judge*:

Pending before us is a petition for rehearing of our May 19, 1994, decision, 24 F.3d 457, affirming the District Court's denial of a motion, pursuant to Fed. R. Civ. P. 60(b). The motion sought to vacate a default judgment obliging defendant La Fuerza Aerea Boliviana (the Bolivian Air Force) ("BAF") to pay plaintiff Transaero, Inc. $983,696.60. The petition arises in an unusual procedural context that prompts this brief opinion.

In the course of the default proceedings in the District Court, Judge Mishler ruled on April 21, 1989, that BAF had been given proper notice of Transaero's complaint and of the hearing that led to entry of the default judgment. After entry of the default judgment, Transaero brought suit in the District Court for the District of Columbia to enforce its judgment. BAF sought summary judgment to dismiss the enforcement proceedings on the ground of improper service of the complaint in the Eastern District action. The late Judge Revercomb denied that motion on September 25, 1992. BAF appealed the interlocutory ruling, *see Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990)

(denial of claim of sovereign immunity appealable as collateral order).

While the D.C. Circuit appeal was pending, BAF filed a motion under Rule 60(b) in the Eastern District of New York to vacate the default judgment. BAF relied primarily on a claim that the default judgment had been obtained by fraud, a claim based on representations by Transaero's counsel in support of the entry of default judgment. Judge Mishler denied the Rule 60(b) motion on August 12, 1993, and BAF appealed that ruling to this Court.

In its appeal, BAF primarily renewed its contention that the default judgment had been obtained by fraud. Its appellate brief also contended that the default judgment should have been vacated because BAF had no "actual" notice of the judgment until February 28, 1992, almost three years after the judgment was entered. The brief referred to this notice as notice "pursuant to section 1608(e)" of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611 (1988). Brief for Appellant at 41 n.12. BAF contended that the lateness of the notice of the judgment, along with other considerations, amounted to "extraordinary circumstances," *see Ackermann v. United States*, 340 U.S. 193, 199 (1950), justifying Rule 60(b) relief. The brief did not contend that defective service of the complaint impaired the validity of the Eastern District judgment.

In its reply brief, however, BAF asserted that it had not been properly served with notice of either the suit or the March 1989 inquest that led to the entry of the default judgment. It made this assertion in the course of answering Transaero's argument that Judge Revercomb's ruling in the District of Columbia had a preclusive effect on the issue of adequacy of notice of the suit. BAF responded

that Judge Revercomb's ruling had no preclusive effect because it was an interlocutory ruling, citing *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89-90 (2d Cir. 1961). "There is literally no judgment in that case [the District of Columbia litigation] yet—let alone a *final* judgment." Reply Brief for Appellant at 9. BAF also contended that preclusion was inapplicable because "the issue of notice had nothing to do with [Judge Revercomb's] order." *Id.*

At oral argument on the appeal, both sides took the position that the adequacy of the notice that initiated the Eastern District suit would be resolved by the then-pending appeal in the D.C. Circuit from Judge Revercomb's ruling. On May 19, 1994, we affirmed Judge Mishler's denial of the Rule 60(b) motion. 24 F.3d 457 (2d Cir. 1994). Our decision rejected the claim of a fraud on the court, but remanded to permit the District Court to reconsider two aspects of the interest calculation—the proper starting date for the running of interest and the proper interest rate. The only reference in the opinion to the issue of defective notice of the suit is a footnote acknowledging BAF's contention and noting that Judges Mishler and Revercomb had rejected BAF's argument and that Judge Revercomb's ruling was on appeal. *Id.* at 459 n.1.

On July 6, 1994, BAF filed the pending petition for rehearing. The petition primarily contended that the remand should be expanded to include consideration of the proper ending date for the running of interest. The petition also urged that we stay our mandate until BAF's jurisdictional challenges have been adjudicated in the D.C. Circuit.

On July 29, 1994, the D.C. Circuit decided the appeal from Judge Revercomb's ruling and reversed. *Transaero*

v. La Fuerza Aerea Boliviana, 30 F.3d 148 (D.C. Cir. 1994). By a divided vote, the Court ruled that BAF is a "foreign state" rather than an "agency or instrumentality of a foreign state" for purposes of section 1608 of the FSIA and that service was not properly accomplished pursuant to subsection 1608(a), applicable to service on a foreign state, although it may have sufficed under subsection 1606(b), applicable to service on an agency or instrumentality of a foreign state. The Court concluded that the Eastern District of New York lacked personal jurisdiction and that the default judgment was void and unenforceable; the enforcement proceedings in the District of Columbia were ordered dismissed. A petition for rehearing with a suggestion for rehearing in banc was denied on September 15, 1994.

We then invited the parties' views as to whether the default judgment should now be vacated. In response, both sides have substantially altered their prior positions. Transaero now contends that the D.C. Circuit's opinion should not cause us to vacate the default judgment because (a) the opinion is incorrect on the merits, (b) BAF is precluded by judicial estoppel from abandoning the position it has taken in prior litigation before the courts of this Circuit that it is an instrumentality of the Republic of Bolivia, and (c) this Court's affirmance of Judge Mishler's denial of the Rule 60(b) motion is a ruling implicitly upholding the jurisdictional validity of the default judgment that should have been accorded preclusive effect in the District of Columbia.

For its part, BAF abandons the contention, urged on the appeal to this Court, that Judge Revercomb's ruling had no preclusive effect because it was interlocutory, and now contends that his ruling, until reversed, had preclusive effect on the issue of statutory service and prevented BAF

from raising the issue of defective service when it filed its Rule 60(b) motion in the Eastern District of New York. BAF urges that the preclusive effect of the D.C. Circuit's opinion in its favor requires us now to vacate the default judgment.

1. Turning first to the significance of the D.C. Circuit's opinion on the pending petition, we conclude that whatever preclusive effect that decision might have on issues that are open for decision in any court, it is not a circumstance requiring us to grant BAF's petition for rehearing. That petition afforded BAF an opportunity to indicate "the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." Fed. R. App. P. 40(a). BAF's petition for rehearing did not contend that we had overlooked or misapprehended any aspect of its contention regarding defective service. Indeed, it is by no means clear that BAF's initial appeal had urged us to reverse the denial of the Rule 60(b) motion for lack of defective service. In short, we have now pending no open issue on which the preclusive effect of the D.C. Circuit's decision, if any, may operate. Therefore, without expressing any views as to (a) the validity of Transaero's service upon BAF in initiating the Eastern District suit or (b) whether the default judgment is impaired by the allegedly late notice of its entry, we decline to grant the petition for rehearing just because the D.C. Circuit has ruled that the default judgment is not enforceable in the District of Columbia. We need not decide whether BAF is entitled to pursue a new Rule 60(b) motion in the Eastern District, now that the D.C. Circuit has declared the default judgment to be void.

2. With respect to the calculation of interest, we think that BAF's contention concerning the scope of the remand has merit. Its brief on the appeal from the denial of the

Rule 60(b) motion complained not only about the two points mentioned in the panel's opinion (the interest started too early and the rate exceeded the contract rate) but also about the proper date for cessation of interest. Brief for Appellant at 21. We see no reason not to broaden the remand to permit the District Court to consider the proper date for the cessation of interest, and Transaero's opposition papers are silent on this question.

3. With respect to the mandate, BAF appears to have sought a stay of our mandate only until the conclusion of the D.C. Circuit's consideration of the appeal in that court. However, since Transaero has represented that it will seek a writ of certiorari to have that decision reviewed by the Supreme Court, we will stay our mandate until the petition for certiorari is decided, and, if granted, until decision by the Supreme Court.

Accordingly, the petition for rehearing is granted only to the limited extent of broadening the remand to include consideration of the cessation of interest, and is otherwise denied. The mandate is stayed.

APPENDIX H

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 92-7222 **September Term, 1993**
USDC Ms. No. 91-0139

Transaero, Inc.,

Appellee, Filed: Sep 15, 1994

v.

La Fuerza Aerea Boliviana,

Appellant

BEFORE: Williams and Sentelle, Circuit Judges

O R D E R

Upon consideration of appellee's petition for rehearing filed August 29, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 92-7222 **September Term, 1993**
USDC Ms. No. 91-0139

Transaero, Inc.,

Appellee, Filed: Sep 15, 1994

v.

La Fuerza Aerea Boliviana,

Appellant

BEFORE: Edwards, Chief Judge; Wald, Mikva, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph and Rogers, Circuit Judges

O R D E R

Appellee's Suggestion For Rehearing In Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:
Robert A. Bonner
Deputy Clerk

Circuit Judges Mikva and Ginsburg did not participate in this matter.

APPENDIX I

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 92-7222 **September Term, 1993**
USDC Ms. No. 91-0139

Transaero, Inc.,

Appellee, Filed: Nov. 04, 1994

v.

La Fuerza Aerea Boliviana,

Appellant

BEFORE: Williams and Sentelle, Circuit Judges

O R D E R

Upon consideration of appellee's motion to stay mandate, the response thereto and of the reply, it is

ORDERED, by the court, that the motion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 92-7222 **September Term, 1993**
USDC Ms. No. 91-0139

Transaero, Inc.,

Appellee, Filed: Dec. 2, 1994

v.

La Fuerza Aerea Boliviana,

Appellant

BEFORE: Williams and Sentelle, Circuit Judges

ORDER

Upon consideration of the Motion and Supporting Memorandum of Transaero, Inc. for Reconsideration of Order Denying Motion For Stay of Mandate, it is

ORDERED, by the Court, that the aforesaid motion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:
Robert A. Bonner
Deputy Clerk

APPENDIX J

Transcriptions of copies of letters contained in
Joint Appendix in the Proceeding below at JA125-128.

EMBAJADA DE BOLIVIA
Washington, D.C. 20008

Washington, D.C. November 1, 1991
EMBO 842/91

Mr. Robert D. Costello
Attorney at Law
150 W. 55th Street
New York, N.Y. 10019

Dear Mr. Costello:

This Embassy has received instructions from the Ministry of Foreign Affairs of Bolivia to convey the following information to you. The Ministry of Finance is presently able and ready to begin proceedings to reconcile the account of the debt owed to Transaero Inc. by the Bolivian Air Force, through a commission formed by the Ministry of Finance, Transaero Inc. and the Bolivian Air Force. An appropriate payment schedule could subsequently be negotiated with the agreement of all concerned.

I avail myself of this opportunity to express my best personal regards.

Sincerely,

Jorge Crespo Velasco
Ambassador

FGO/xhc

November 8, 1991

Honorable Jorge Crespo Velasco
Ambassador
Embajada De Bolivia
3014 Massachustets Avenue, N.W.
Washington, DC 20008

Dear Ambassador Velasco:

Reply is made to our letter of November 1, 1991 and my several telephone conversations with Mr. Gonzalez.

On behalf of my client, Transaero, Inc., I wish to express my appreciation for your government's willingness to cooperate in resolving the outstanding obligation.

As indicated in the documents I have previously provided, the amount of the obligation on April 28, 1988 was $983,696.60. Since that date statutory interest has accrued at the rate of 9% per annum. Anticipating that it will take another month or so to resolve this fully, I calculate the total amount that will be due as of January 1, 1992 to be $1,230,054.49.

I look forward to your response and payment proposal.

Very truly yours,

RDC/nmw

EMBAJADA DE BOLIVIA
Washington, D.C. 20008

Washington, D.C. November 18, 1991
EMBO 867/91

Mr. Robert D. Costello
Attorney at Law
150 W. 55th Street
New York, N.Y. 10019

Dear Mr. Costello:

This is to acknowledge receipt of your letter dated November 8, 1991, which has been transmitted to the Ministry of Finance of Bolivia.

I will get in touch with you as soon as I receive any further instructions or information on this subject.

Sincerely,

Fernando Gonzalez Quintanilla
Charge d'Affairea a.i.

FGQ/xhc

December 10, 1991

Mr. Fernando Gonzalez Quintanilla
Charge d'Affaires a.i.
Embajada de Bolivia
Washington, DC 20008

Re: Transaero, Inc.

Dear Mr. Quintanilla:

It is now more than one month since I wrote providing you with the details of what sums are due and several months since extending the courtesy of contacting your offices once again before taking affirmative action to enforce my client's judgment.

I feel that the Ministry of Finance has had more than sufficient time and opportunity to resolve this matter. Consequently, I request your immediate response to my previous correspondence.

Your cooperation is urged to avoid the interference that will necessarily follow from enforcement proceedings.

Very truly yours,

RDC/mmw
cc: Transaero, Inc.

APPENDIX K

LAW OFFICES
GROVE, JASKIEWICZ AND COBERT
SUITE 400
1730 M STREET NORTHWEST
WASHINGTON, D.C. 20036-4579

(202) 296-2900
FAX (202) 296-1370

May 23, 1994

Hand Delivered
Mr. Ron Garvin, Clerk
United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

Re: Transaero, Inc., Appellee, v. La Fuerza Aerea Boliviana, Appellant; Docket No. 92-7222

Dear Mr. Garvin:

Pursuant to Federal Rule of Appellate Procedure 28(j), Appellee, Transaero, Inc., requests that the May 19, 1994 decision of the United States Court of Appeals for the Second Circuit in *Transaero, Inc., v. La Fuerza Aerea Boliviana*, No. 93-7903 (2d Cir. May 19, 1994) be brought

to the attention of the Court. A copy of the decision is attached hereto. It affirms the April 28, 1989 judgment against Appellant, the validity of which Appellant is also challenging in this Court. With regard to the matters now on appeal before this Court, Transaero notes that at footnote one (1) of the decision, the Second Circuit specifically rejects La Fuerza's arguments that it lacked proper notice of Transaero's complaint and of the hearing. The Second Circuit notes that both Judge Mishler and Judge Revercomb, in separate proceedings, found that La Fuerza did have proper notice. While the Second Circuit notes the pendency of Appellant's appeal of Judge Revercomb's decision to this Court, its decision of May 19, 1994 affirms Judge Mishler's determination and the judgment. Appellee submits that the Second Circuit's decision is dispositive of the matters now on appeal before this Court.

Appellee Transaero, Inc., is prepared to provide further briefing as to the appropriate disposition of this appeal should the Court so desire.

Sincerely,

Ronald N. Cobert

Enclosures

cc: All parties of record

APPENDIX L

STATUTORY MATERIAL

Excerpts from the Foreign Sovereign Immunities Act of 1976, Title 28, United States Code.

§1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

§ 1391. Venue generally

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought -

(1) in any judicial district in which a substantial part of the event or omissions giving rise to the

claim occurred, or a substantial part of property that is the subject of the action is situated.

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

§ 1603. Definitions

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services -- and the Secretary shall transmit one copy of the papers through diplomatic

channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraph (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state --

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of

any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or

from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2),(3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

§ 1611. Certain types of property immune from execution

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if--

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.